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(4)

No. 04- 05-8392

Supreme Court, U.S.
FILED
AUG 2 2 2005
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2004

JACOB ZEDNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

The Speedy Trial Act of 1974, as amended, 18 U.S.C. §§ 3161-3174 (West 2005), requires the government to bring a criminal defendant who pleads not guilty to trial within 70 days, excluding certain specified periods. 18 U.S.C. § 3161(c)(1) & (h). If this time limit is exceeded, the "indictment shall be dismissed on motion of the defendant." 18 U.S.C. § 3162(a)(2). Dismissal may be either "with or without prejudice." 18 U.S.C. § 3162(a)(2). The Act specifies only one way in which a defendant may waive this right to dismissal, i.e., by not moving to dismiss before trial. 18 U.S.C. § 3162(a)(2).

This case presents two questions that divide the courts of appeals:

1. Whether, in light of the statute's text and Congress's goal of protecting the public interest in prompt criminal trials, the requirements of the Speedy Trial Act may be waived only in the limited circumstances mentioned in the statute, the issue left open in New York v. Hill, 528 U.S. 110, 117 n.2 (2000).

2. Whether a violation of the Speedy Trial Act's 70-day time limit for bringing a defendant to trial is subject to harmless-error analysis, despite the statute's mandatory language stating that, in the event of a violation, the "indictment shall be dismissed."

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Petition for a Writ of Certiorari

Petitioner Jacob Zedner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming his conviction.

Opinions Below

The Second Circuit's opinion is reported at 401 F.3d 36. A. 2-30.[1] The district court's decision denying Mr. Zedner's motion to dismiss the indictment under the Speedy Trial Act is unpublished. That decision is reproduced at A. 36-51. The judgment of conviction appears at A. 31-35.

Jurisdiction

The Second Circuit's judgment was entered on March 8, 2005. The Second Circuit's order denying rehearing and rehearing en banc was entered on May 24, 2005. A. 1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Relevant Statutory Provisions

This case principally involves the Speedy Trial Act of 1974, as amended, 18 U.S.C. §§ 3161-3174 (West 2005) ("the Act"). The court of appeals also cited the provisions of 28 U.S.C. § 2111 and Fed. R. Crim. P. 52(a). The text of these statutes and of Rule 52(a) is reproduced in the Appendix at A. 52-63.

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[1] References to "A." are to the attached Appendix.

Statement of the Case

Introduction

This criminal prosecution began almost a decade ago. On March 12, 1996, Jacob Zedner was arrested for repeatedly attempting to open a bank account using a phony $10 million "bond." A. 3-4. The document fooled nobody because it contained obvious misspellings (e.g., "Onited States," "Thunted States," "Cgicago") and other indicia that it could not possibly be real. A. 3-4 & n.1.

On April 4, 1996, Zedner was indicted for bank fraud in the Eastern District of New York. A. 4. Absent permissible exclusions of time, the Speedy Trial Act required that he be brought to trial within 70 days of his indictment, i.e., by June 13, 1996. See 18 U.S.C. § 3161(c)(1) & (h). Mr. Zedner was not tried until April 7, 2003 (A. 8), more than seven years after his indictment and more than two years after he requested a trial "as soon as possible." A. 7. The Second Circuit held, however, that any violation of the 70-day time limit was waived or was a "harmless error." A. 15, 20.

The Speedy Trial Act: An overview

The Speedy Trial Act mandates that a federal criminal trial must begin within 70 days of the filing date of the indictment or the defendant's first appearance, whichever occurs later. 18 U.S.C. § 3161(c)(1). The Act automatically excludes numerous kinds of pre-trial delays from the 70-day limit. 18 U.S.C. § 3161(h)(1)-(7). The Act also grants courts flexibility to exclude other delays, including delays granted at the defendant's request, but only if the court "sets forth, in the record of the case, either

orally or in writing, its reasons for finding that the ends of justice ... outweigh the best interests of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A). This exclusion is commonly known as an "ends of justice" exclusion.

The sanction for a violation of the 70-day time limit is dismissal of the indictment. 18 U.S.C. § 3162(a)(2). The court has discretion to dismiss the indictment with or without prejudice to re-prosecution, depending on various factors, such as the seriousness of the offense, the facts and circumstances that led to the violation, the prejudice, if any, to the defendant, and the impact of reprosecution on the administration of the Act and on the administration of justice. 18 U.S.C. § 3162(a)(2); United States v. Taylor, 487 U.S. 326 (1988). The Act provides only one way in which a defendant may waive his right to dismissal: i.e., by not moving to dismiss prior to trial. 18 U.S.C. § 3162(a)(2).

The speedy trial waiver "for all time"

Mr. Zedner's case was assigned to a judge who had previously described the Speedy Trial Act as "an 'abomination.'" United States v. Caparella, 542 F. Supp. 826, 827 (E.D.N.Y. 1982) (quoting United States v. Alexander, 529 F. Supp. 452, 456 (D.C. Colo. 1982)). On November 8, 1996, after granting several adjournments, the court became concerned that Zedner might request a speedy trial at an inconvenient time. A. 4. Accordingly, the court asked him, as a condition of obtaining future adjournments, to execute a blanket waiver of his constitutional and statutory speedy trial rights "for all time." A. 4-5. The court told Mr. Zedner and his

counsel that it had taken the position that such a waiver was enforceable and that "nobody has yet challenged [this position]." Transcript, Nov. 8, 1996, at 4.

The speedy trial motion

After Zedner signed this waiver, his trial was slow in coming. By March of 2001, he had still not been tried, despite his request six months earlier for a trial "as soon as possible." A. 7. At that point, he had been living under the stress and cloud of a federal indictment, as well as bail restrictions, for half a decade. Accordingly, on March 7, 2001, Zedner, represented by new counsel, moved to dismiss the indictment with prejudice under the Speedy Trial Act. A. 7-8. The basis for the motion was that more than 70 non-excluded days had elapsed, including: 1) 91 days that passed between January 31, 1997, and May 2, 1997; and, 2) 165 days that elapsed between September 23, 2000, and March 7, 2001. A. 7-8, 10.

On March 21, 2001, the district court denied the speedy trial motion. A. 36-51. The court found this single-defendant case to be "complex" and ruled enforceable the waiver in perpetuity executed by Mr. Zedner in 1996. A. 36-37.[2] The court reasoned that, because a defendant may waive his right to a speedy trial by

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[2] The court also held that Zedner had waived his right to dismissal by not moving to dismiss before his trial was originally scheduled to commence in October of 1998. A. 37. The Act, however, only required Zedner to move for dismissal "prior to trial." 18 U.S.C. § 3162(a)(2). Zedner moved to dismiss in March of 2001, more than two years before he was tried in April of 2003. The Second Circuit did not rely on this alternative waiver rationale offered by the district court.

inaction (i.e., by not moving to dismiss before trial), see 18 U.S.C. § 3162(a)(2), a defendant "most certainly may waive such rights by affirmative action as he has done voluntarily and under oath, with the advice of counsel, here." A. 36-37.[3]

The trial and sentence

Mr. Zedner's trial finally went forward on April 7, 2003. His defense was that he lacked the intent to defraud because he suffered from delusions that caused him to believe that his obviously phony bond was genuine. A. 8. The prosecutor had successfully delayed the trial for several years, over the defense's objection, by citing Zedner's delusions, persuading both the district court and the court of appeals that they were so severe that they rendered Zedner mentally incompetent for a time. See, e.g., A. 7-8, 37-45. At trial, however, when defense counsel cited these delusions to show Zedner's lack of fraudulent intent, the same prosecutor suddenly switched positions and argued, contrary to all the medical evidence (including the report of the government's own doctors), that Zedner was faking his delusions.[4]

On April 15, 2003, the jury convicted Mr. Zedner on all

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[3] The district court's speedy trial ruling was not appealable until after Mr. Zedner was convicted more than two years later. See United States v. MacDonald, 435 U.S. 850, 863 (1978) (defendant may not, before trial, appeal order denying speedy trial motion).

[4] Mr. Zedner argued on appeal that this shift in positions was cognizable as a plainly erroneous denial of due process that likely resulted in the conviction of a person who, by reason of mental illness, was innocent. The Second Circuit did not address this issue in its opinion.

counts. He was sentenced to 63 months in prison, based on the court's finding that, because Zedner presented his $10 million "bond" to six banks, he was responsible for an intended "loss" of $60 million under the Sentencing Guidelines.[5]

The Second Circuit's decision

The Second Circuit affirmed the denial of Zedner's speedy trial motion. The court, however, did not rely on the waiver "for all time," noting that such a waiver "may be ineffective." A. 12. The court reasoned, "Th[e] public interest would be undermined if the provisions of the Act intended for the public benefit could be routinely nullified by a defendant's waiver." A. 12; see also United States v. Gambino, 59 F.3d 353, 360 (2d Cir. 1995) (defendants "generally" may not waive the Act's requirements).

Nevertheless, the court held that Zedner implicitly waived his right to dismissal based on the delay between January 31, 1997, and May 2, 1997, because Zedner's former counsel had requested this delay to further "investigate" whether the misspelled "Onited States" bond was genuine.[6] A. 15. No relief was warranted, the court of appeals determined, because this delay was "reasonable" and "could have" been -- but admittedly was not (see A. 5) --

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[5] The Second Circuit remanded for re-sentencing to ensure that the district court understood its authority to depart downward from the then-mandatory Guideline range. A. 25-30.

[6] Although this case had already been pending for almost a year, the district court granted defense counsel this additional 91-day continuance on January 31, 1997, citing the waiver "for all time," without making any "ends of justice" findings. Of course, no evidence of the authenticity of Zedner's "bond" was ever uncovered.

excluded from the Speedy Trial Act clock in accordance with the "ends of justice" procedures required by 18 U.S.C. § 3161(h)(8)(A). A. 15.

The Second Circuit recognized that the circuits are divided over whether a waiver may be found where the delay could have been, but was not, properly excluded. A. 12-15. After reviewing the conflicting approaches of various circuits, the Second Circuit held that recognition of implicit waivers was appropriate. The court declined to define the scope of its waiver rule, holding: "At the very least, when a defendant requests an adjournment that would serve the ends of justice, that defendant will not be heard to claim that her Speedy Trial rights were violated by the court's grant of her request, regardless [of] whether the court made an 'ends of justice' finding under § 3161(h)(8)." A. 15. But see 18 U.S.C. § 3161(h)(8)(A) ("No ... period of delay resulting from a continuance granted by the court [at the request of the defendant] shall be excludable ... unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.").

The Second Circuit also denied relief based on the 165-day delay between September 23, 2000, and March 7, 2001. This delay occurred after the district court took the government's motion to determine Zedner's competency "under advisement" on August 23, 2000. A. 7. The court had 30 days from that point, i.e., until

September 23, 2000, to resolve the competency motion before the speedy trial clock would start ticking again. A. 16 n.4; 18 U.S.C. § 3161(h)(1)(J) (excluding "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court."); see also Henderson v. United States, 476 U.S. 321, 328-29 (1986) (Act "allows exclusion of up to 30 days while the district court has a motion 'under advisement,' i.e., 30 days from the time the court receives all the papers it reasonably expects...."). For reasons the district court never explained, the competency motion was not resolved until March 21, 2001, and only after Zedner moved to dismiss pursuant to the Speedy Trial Act. A. 7-8.

The Second Circuit did not decide whether this unexplained delay exceeded the Act's 70-day time limit, holding that any violation during this period was a "harmless error." A. 20.[7] The Act requires that the "indictment shall be dismissed" upon request if the 70-day limit is exceeded. 18 U.S.C. § 3162(a)(2). Nevertheless, the Second Circuit held that "harmless error analysis is appropriate in Speedy Trial Act cases" (A. 18), pursuant to 28 U.S.C. § 2111 and Fed. R. Crim. P. 52(a), because "there are excellent reasons to distinguish between errors under the Speedy Trial Act that are harmless and those that are harmful." A. 19. The court concluded that a mandatory dismissal without prejudice

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[7] The Second Circuit did not and could not rely on waiver principles to excuse this delay, because Zedner had specifically requested a trial "as soon as possible" before the delay occurred.

can be "costly" and "illogical:"

> A case tried to satisfactory conclusion a few days later than the Act specifies, without substantial adverse effect on anyone, can require costly retrial a year or more later, after appeal, dismissal of the indictment, and reindictment, in a manner causing vast expense, inefficiency, unfairness, and unjustifiable delay in the administration of justice. We see no reason to believe Congress intended such illogical results.

A. 19.

The Second Circuit went on to hold that the 165-day delay in this case was "harmless" and "technical." A. 17, 20. The court reasoned that, after this long delay occurred, Zedner was found incompetent, so he must have been incompetent ever since August of 2000, and, therefore, he could not have been tried during this particular period.[8] A. 16, 20. This rationale, however, does not explain the district court's failure to resolve the competency issue until long after the speedy trial clock had expired. And the Second Circuit overlooked the broader harm: If the unexplained 165-day delay had not occurred, Zedner could have been treated for his incompetency and tried 165 days sooner.

Petitioner sought rehearing. He argued, inter alia, that the court's refusal to order dismissal, on harmless-error grounds, violated the plain language of Section 3162(a)(2) and conflicted with this Court's unanimous decision in Alabama v. Bozeman, 533

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[8] The Second Circuit also noted that defense counsel had a difficult pregnancy as of "late November 2000." A. 16. The district court never cited this factor (or any other) as a basis for the delay. Indeed, as the Second Circuit acknowledged, there is no evidence the district court even knew of counsel's pregnancy complications. A. 7 n.2.

U.S. 146 (2001). Rehearing was denied on May 24, 2005. A. 1.

Reasons for Granting the Writ

This case presents an ideal opportunity for this Court to resolve two important questions that divide the courts of appeals concerning the proper interpretation and application of the Speedy Trial Act. The first issue was left open in New York v. Hill, 528 U.S. 110, 117 n.2 (2000): May a defendant waive the requirements of the Act, either explicitly or implicitly, by seeking a trial date beyond the 70-day time limit? Certiorari is warranted because, as the Second Circuit recognized, the circuits are deeply split over this frequently recurring issue. A. 12-15. Moreover, the Second Circuit's waiver holding is inconsistent with the Act's text, structure, and central purpose: to protect society's interest in the prompt resolution of criminal trials "whether or not prosecutors or defendants perceive speed to be in their interest." A. Partridge, Legislative History of Title I of the Speedy Trial Act of 1974 34 (Fed. Jud. Center 1980) [hereinafter "Partridge"]; see also United States v. Willis, 958 F.2d 60, 63 (5th Cir. 1992) ("The Act is intended to protect the defendant from undue delay in his trial and to benefit the public by ensuring that criminal trials are quickly resolved."). Further, the Second Circuit's disregard of the Act's procedural requirements for an "ends of justice" exclusion violates this Court's "cardinal canon" of statutory construction: "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-254

(1992). See Point I, infra.

Granting review in this case will also allow the Court to resolve a related issue upon which the courts of appeals are also divided: May the Act's mandatory sanction of dismissal be avoided on grounds of harmless error? When it decided this case, the Second Circuit was the only circuit to hold that the mandatory dismissal provisions of Section 3162(a)(2) permit an untimely conviction to be affirmed on grounds of harmless error. A. 16-20; Gambino, 59 F.3d at 363. The Seventh Circuit has since followed the Second Circuit's holding. United States v. Smith, 415 F.3d 682 (7th Cir. July 18, 2005). Every other circuit holds, expressly or by implication, that harmless-error analysis and similar prudential doctrines are inapplicable because the Act makes dismissal mandatory even in the absence of prejudice. See, e.g., United States v. Crane, 776 F.2d 600, 606 (6th Cir. 1985); United States v. Carey, 746 F.2d 228, 230 (4th Cir. 1984); United States v. Perez-Reveles, 715 F.2d 1348, 1353-54 (9th Cir. 1983); and authorities cited infra, p. 28 n.14. Thus, there is a 10-to-2 circuit split on this issue. Review is also warranted because the Second Circuit's harmless-error holding does violence to the unambiguous "shall be dismissed" language of the Act, see United States v. Taylor, 487 U.S. 326, 332 (1988), and conflicts with this Court's unanimous holding in Alabama v. Bozeman, 533 U.S. 146 (2001), which interpreted similar dismissal language in an analogous federal speedy trial statute to preclude harmless-error analysis. See Point II, infra.

Given the direct conflict among the circuits on these two important questions, and the Second Circuit's failure to heed the plain language of the Act, this Court's intervention is essential. After extensive debate, Congress passed, and the President signed, the Speedy Trial Act to provide a uniform national rule to expedite federal criminal trials, with compliance ensured by the mandatory sanction of dismissal (with or without prejudice). See generally United States v. Strand, 566 F.2d 530, 532-33 (5th Cir. 1978); Partridge, at 11-34. Yet, because of the conflicting waiver and harmless-error rulings of the various circuits, a defendant's (and the public's) statutory right to a speedy trial "now depends almost as much on the happenstance of geography as it does on the will of the Legislative Branch." Williford v. United States, 469 U.S. 893, 894 (1984) (White, J., dissenting from the denial of certiorari in a Speedy Trial Act case).

I.

The Second Circuit's waiver holding exacerbates a longstanding and acknowledged circuit split and contravenes the Speedy Trial Act.

This case squarely presents the important and frequently recurring question left open in Hill, 528 U.S. at 117 n.2: Are the requirements of the Speedy Trial Act subject to waiver only in the narrow circumstances expressly mentioned in the statute?

Hill held that a defendant, by seeking delay, could waive his right to be tried within the time periods set forth in Article III of the Interstate Agreement on Detainers ("IAD"). Id. at 118. The Court distinguished the IAD from the Speedy Trial Act, noting that

the time limits of the Speedy Trial Act begin to run automatically rather than upon request, that dismissal under the Speedy Trial Act may sometimes be without prejudice, and that the Speedy Trial Act expressly allows waiver under certain limited circumstances. Id. at 117 n.2. The Court cautioned, however, that "the question of waiver under the Speedy Trial Act is not before us today, and we express no view on the subject." Id.

This unresolved issue is squarely presented by this case. The issue is important to the day-to-day conduct of federal prosecutions, has divided the courts of appeals for many years, and frequently recurs. Moreover, the Second Circuit's resolution of the waiver issue is inconsistent with the text, structure, and purposes of the Act, and violates settled rules of statutory construction as enunciated by this Court.

A. The circuits are deeply divided over whether compliance with the Speedy Trial Act may be excused on grounds of waiver.

As the Second Circuit discussed, the courts of appeals are in conflict over whether compliance with the requirements of the Act may be excused on a waiver theory. A. 12-15. In fact, the circuit split is even more pronounced and developed than the Second Circuit recognized.

The circuits have adopted three distinct positions on the waiver question: 1) the "no waiver" position (adopted by the Third, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits);[*] 2) the

[*] See, e.g., United States v. Carrasquillo, 667 F.2d 382, 391 (3d Cir. 1981); United States v. Blackwell, 12 F.3d 44, 48 (5th Cir. 1994); Willis, 958 F.2d at 64 (5th Cir. 1992); Greenup v. (continued...)

"broad waiver" position (adopted by the Eleventh and District of Columbia Circuits);[10] and, 3) the "intermediate waiver" position (adopted in different forms by the First, Second, Fourth, and Seventh Circuits).[11]

1. The "no waiver" position: The Third, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits

Six circuits -- the Third, Fifth, Sixth, Eighth, Ninth and Tenth -- hold that a court's failure to comply with the requirements of the Act may not be excused on grounds of express or implied waiver (except in the narrow circumstances provided by the statute). More specifically, these circuits hold that, absent proper "ends of justice" findings, see 18 U.S.C. § 3161(h)(8)(A), a delay caused or requested by the defendant "shall not be excludable," id., on a waiver theory or otherwise. See supra, p. 13 n.9.

The Fifth Circuit adopted its "no waiver" position in Willis. 958 F.2d at 64. There, the defendant requested additional time to

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[9] (...continued)
United States, 401 F.3d 758, 764, Nos. 03-6530, 03-6580 (6th Cir. Mar. 29, 2005), ordered unpublished (6th Cir. June 2, 2005), reh'g en banc denied (6th Cir. Aug. 2, 2005); United States v. Ray, 768 F.2d 991, 998 n.11 (8th Cir. 1985), overruled on other grounds, Henderson v. United States, 476 U.S. 321 (1986); United States v. Ramirez-Cortez, 213 F.3d 1149, 1154 (9th Cir. 2000); United States v. Pasquale, 25 F.3d 948, 951-52 (10th Cir. 1994).

[10] See United States v. West, 142 F.3d 1408, 1412 (11th Cir. 1998), vacated on other grounds, 526 U.S. 1155 (1999); United States v. Twitty, 107 F.3d 1482, 1487 (11th Cir. 1997); United States v. Marshall, 935 F.2d 1298, 1302 (D.C. Cir. 1991).

[11] A. 15; United States v. Pringle, 751 F.2d 419, 434-36 (1st Cir. 1984); United States v. Keith, 42 F.3d 234, 239-40 (4th Cir. 1994); United States v. Kucik, 909 F.2d 206, 210-11 (7th Cir. 1990).

prepare for trial and, at the prompting of the district court, waived his speedy trial rights. Id. at 60-61. The court then granted an open-ended continuance until the defendant indicated he was ready for trial. Id. at 62. The defendant later moved unsuccessfully to dismiss the indictment based on the resulting period of delay. Id. The Fifth Circuit, however, reversed the defendant's conviction. The court held that the Act's requirements may not be waived explicitly by affirmative agreement, and that a broad exception would swallow this rule. The court noted that "the defendant should not be allowed to argue one legal theory or characterization of facts to obtain a continuance and then argue that the district court's ruling was erroneous to seek dismissal under the Act." Id. at 64. But, the Fifth Circuit held, "[a] district court is not sandbagged or otherwise misled ... by a defendant's simple request for or acquiescence in a continuance and its own insistence upon a waiver." Id. The court recognized that the "no waiver" rule would be "meaningless if ... the defendant waives his ability to move for dismissal ... simply by asking for or agreeing to a continuance." Id. The Fifth Circuit therefore charged district courts with the responsibility of ensuring that any request for a continuance, even one sought or agreed to by the defendant, "falls within one of the Act's exceptions." Id.

The Fifth Circuit "reemphasize[d]" this "bright line" rule in Blackwell, 12 F.3d at 48. That case reaffirmed that waiver principles were inapplicable even though the defendant had requested the delay in question in order to prepare his defense.

Id. at 46. The Fifth Circuit wrote:

> Today we reemphasize that Willis provides a bright line for the district courts to follow. In the absence of contemporaneous, articulated on-the-record findings for extending the time for trial past seventy days amounting to an acceptable ends of justice analysis, Defendant-Appellant is entitled to have his case dismissed. See 18 U.S.C. § 3162(a)(2).

Id. at 48.

The Tenth Circuit takes a similar "no waiver" view. In Pasquale, 25 F.3d at 952-53, the court reversed the defendant's conviction, even though defense counsel had requested a trial date beyond the 70-day period. The Tenth Circuit rejected the government's argument that, "because 'each of these continuances was granted at the specific request of the defendant' he may not claim that the Act was violated by their grant." Id. at 952. The court held that "'[t]he fact that the defendant has requested the continuance ... is not in itself sufficient to toll the operation of the time limits.'" Id. (citations omitted). A "motion for a continuance does not constitute a waiver of the Act, as any 'waiver' by the Defendant is necessarily invalid unless the court simultaneously makes 'ends of justice findings.'" Id. (quoting United States v. Saltzman, 984 F.2d 1087, 1091 (10th Cir. 1993)).[12]

The Third Circuit adopted the "no waiver" position in Carrasquillo. In that case, the trial date was put off beyond the

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[12] The waiver question has caused conflict and confusion even within the Tenth Circuit. See United States v. McSwain, 197 F.3d 472, 483 (10th Cir. 1999) (rejecting pro se defendant's arguments under the Speedy Trial Act, without citing Pasquale or Saltzman, on the ground that the defendant "waived his right to a speedy trial").

70-day limit at the request of defense counsel, but no "ends of justice" findings were made. 667 F.2d at 383, 385. In an alternative holding reversing the conviction, the court held that defense counsel's action did not waive the Act's requirements. Id. at 388-90.

> We do not think a defendant may waive the public's right to a speedy trial unless he complies with the requirements carefully set forth in section 3161(h). Alternative arrangements should be made only when the court specifically finds "that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." We do not find excludable time under a "waiver" theory.

Id. at 390; see also id. at 391 (Higginbotham, J., concurring) (agreeing that reversal was required because the Act's language and legislative history made "so clear" that the Act's requirements could not be waived).

The Eighth Circuit followed the Third Circuit's "no waiver" rule in Ray, 768 F.2d at 998 n.11. The court held that a defendant's written consent to be tried beyond the Act's 70-day period did not excuse the district court's failure to make "ends of justice" findings under Section 3161(h)(8)(A). Id. (citing Carrasquillo, 667 F.2d at 389-90).

The Ninth Circuit has similarly held a court's failure to make "ends of justice" findings may not be excused on a waiver theory. See Ramirez-Cortez, 213 F.3d at 1156; Perez-Reveles, 715 F.2d at 1352-55. The Sixth Circuit has also concluded, in unpublished decisions, that the Act's requirements cannot be waived. See, e.g., Greenup, 401 F.3d at 764 (purported "waiver was ineffective"

absent "ends of justice" findings); United States v. Howard, No. 94-6543, 1997 WL 705077, at *5 n.4 (6th Cir. 1997)(dictum).[13]

2. The "broad waiver" position: The Eleventh and District of Columbia Circuits

Two circuits -- the Eleventh Circuit and the District of Columbia Circuit -- enforce a defendant's express waiver of the Act's requirements, so long as the waiver was entered knowingly and voluntarily. See West, 142 F.3d at 1412; Twitty, 107 F.3d at 1487; Marshall, 935 F.2d at 1302. Thus, these circuits require no "ends of justice" findings so long as a defendant has entered a waiver. These circuits appear to place no limit, either causal or temporal, on a Speedy Trial Act waiver.

3. The "intermediate waiver" position: The First, Second, Fourth, and Seventh Circuits

The remaining circuits -- the First, Second, Fourth and Seventh -- have crafted what they describe as an "intermediate" or "middle" position. E.g., A. 14-15. On the one hand, these courts agree with the vast majority of courts that a defendant may not expressly waive the Act's requirements. On the other hand, these courts also hold that a defendant is not entitled to dismissal based on a delay that the defendant caused or requested, even if the procedural requirements of the Act were not satisfied. A. 15; Pringle, 751 F.2d at 434-36; Keith, 42 F.3d at 239-40; Kucik, 909 F.2d at 210-11.

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[13] Although unpublished decisions are not binding precedent in the Sixth Circuit, they "nevertheless can be persuasive authority." Harper v. AutoAlliance Int'l, Inc., 392 F.3d 195, 205 n.3 (6th Cir. 2004) (citations omitted). Petitioner includes them here in the interests of completeness.

In Pringle, a defendant sought three continuances. 751 F.2d at 432. The third motion stated that the defendants "waive their rights to a speedy trial." Id. at 433. The district court granted the motion and scheduled trial for two months later. However, the trial was not held, and an additional five months passed before the filing of a motion stopped the speedy trial clock. The record contained no explanation for the delay. The First Circuit remanded the case to determine the cause, instructing the district court to exclude the five-month period from the speedy trial calculation if the defendants' request for delay and purported waiver had induced the delay. Id. at 435-36. The First Circuit expressed concern that a contrary ruling would reward the defendants because "[i]n essence, defendants would have successfully worked both sides of the street, lulling the court and prosecution into a false sense of security only to turn around later and use the waiver induced leisurely pace of the case as grounds for dismissal." Id. at 434.

The Seventh Circuit followed the First Circuit's reasoning in Kucik, 909 F.2d at 210-11. The court explained, expressing approval of Pringle, that a defendant who "actively participates in a continuance" cannot "then 'sand-bag' the court and the government by counting that time in a speedy trial motion." Id. at 211.

The Fourth and Second Circuits have taken yet another approach to the waiver question. In Keith, the prosecutor fell ill several days before trial was scheduled to start. 42 F.3d at 236. The district court granted the government's motion for a continuance in a written order that was signed by defense counsel as "[s]een and

agreed." Id. The defense attorney later reversed course and moved to dismiss the indictment on speedy trial grounds immediately before the rescheduled trial was to begin. After concluding that the order granting the continuance failed to meet the procedural requirements of the Section 3161(h)(8) "ends of justice" exception, the Fourth Circuit considered whether the defendant could use the delay acquiesced to by his counsel in support of his Speedy Trial Act claim. Id. at 238. The Fourth Circuit expressed concern about the breadth of the rule announced by the First Circuit in Pringle and by the Seventh Circuit in Kucik, which "would appear to find a waiver when a defendant consents to a continuance occasioned on any reason, including the district judge's desire to go fishing." Id. at 239 (emphasis in original). At the same time, the Fourth Circuit characterized the Fifth Circuit's rule in Willis as "too narrow." Id. The Fourth Circuit instead adopted a middle position, concluding that "if a defendant affirmatively consents to a motion for a continuance and the reasons for the granting of that motion as garnered from the record are sufficient to support a finding that the ends of justice would be met by granting the motion, the defendant cannot take advantage of that discrete period of time covered by the continuance in asserting a violation of the Speedy Trial Act." Id. at 240.

Similarly, in this case, the Second Circuit decided to follow the Fourth Circuit's approach in Keith and to reject the Fifth Circuit's approach in Willis. A. 12-14. The Second Circuit justified its decision, not by citing the Act's text or history,

but by invoking the court's own view of "the public interest:"

> We very much doubt that the public interest in expeditious prosecution would be served by a rule that allows defendants to request a delay and then protest the grant of their request. In our view the public interest is not advanced either by allowing such a defendant to escape prosecution altogether, or by dismissing the indictment and reindicting with consequent wasteful reprosecution after a substantial additional delay. But see United States v. Janik, 723 F.2d 537, 546 (7th Cir. 1983).

A. 15. In Janik, to which the "but see" citation refers, the Seventh Circuit held that the Act's mandatory dismissal sanction serves a deterrence function and "is binding on us whatever we may think of its wisdom." 723 F.2d at 546. Judge Posner's opinion for the court added, "A judge may not forgive a violation merely because the sanction that the legislature has provided for the violation seems silly." Id.

The prejudice to petitioner and others resulting from this entrenched split of authority is plain. Had petitioner resided in any of the "no waiver" circuits, his conviction would have been vacated and the indictment dismissed, either with or without prejudice, based on the 91 days that elapsed in 1997 without any order of excludable delay or "ends of justice" findings.

It is also apparent that, absent Supreme Court review, the waiver question will continue to plague federal courts. Given the large number of circuit cases dealing with the waiver question, and the dramatic lack of consensus, there is no reason to believe that the lower courts will be able to resolve their disagreement without this Court's guidance.

B. The Second Circuit's waiver holding is inconsistent with the statute and contravenes basic rules of statutory construction as enunciated by this Court.

This Court should also grant certiorari because the Second Circuit's waiver rule is inconsistent with the text, structure, history, and purposes of the Act.

In general, most rights are subject to waiver, including rights that benefit society. See Hill, 582 U.S. at 114; United States v. Mezzanatto, 513 U.S. 196, 201 (1995). However, a "right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy." Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 704 (1945) (emphasis added) (quoted in Hill, 528 U.S. at 116). Waiver of a statutory right is not allowed where there exists "affirmative indication of Congress' intent to preclude waiver...." Mezzanatto, 513 U.S. at 201.

Such is the case with the Speedy Trial Act. The statute's text, structure, and history demonstrate that Congress intended to preclude waiver, except in the limited circumstances expressly mentioned in the Act.

1. The Second Circuit's waiver rule contravenes the Act's text.

"The Speedy Trial Act is plain-speaking[,]" as the Fifth Circuit has noted. Blackwell, 12 F.3d at 46. Section 3161(h)(8)(A) permits a court to exclude delays granted "at the request of the defendant or his counsel[,]" but only if the court makes specified findings and sets forth reasons to support them. A court may exclude:

> Any period of delay resulting from a continuance granted by any judge on his own motion or **at the request of the defendant or his counsel** or at the request of the attorney for the Government, **if** the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. **No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.**

18 U.S.C. § 3161(h)(8)(A) (emphasis added).

This provision explicitly addresses the question considered by the Second Circuit: Does the speedy trial clock run when a court grants a continuance at the defendant's request? Congress provided a clear answer: "Yes," unless the court "sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." Id. It is undisputed in this case that the district court never provided such reasons to justify the delay from January 31, 1997, to May 2, 1997. A. 5, 11.

The Second Circuit nevertheless held -- eight years after the fact -- that this period was excludable and that "ends of justice" findings were unnecessary. Under the Circuit's broad holding, a continuance granted at the defendant's request does not count for speedy trial purposes, whether or not "ends of justice" findings were made, so long as they "could have been" made. A. 15. This is

not statutory construction; it is statutory destruction. As this Court reiterated just this Term, courts "are not free to rewrite the statute that Congress has enacted." Dodd v. United States, 125 S. Ct. 2478, 2483 (June 20, 2005); see also Willis, 958 F.2d at 64 ("If Congress is troubled by the effects of the dismissal remedy in these cases, it may provide an additional exception under the Act for continuances requested by defendants. Until that time we are bound by the provisions of the Act.").

The Act explicitly provides for waivers, express and implied, only in narrow circumstances. In Section 3162(a)(2), Congress provided for an implied waiver only where the defendant fails to move for dismissal prior to trial. 18 U.S.C. § 3162(a)(2). Had Congress intended to allow implied waivers in other circumstances, it would have said so. See Barnhart v. Sigmon Coal Co., 534 U.S. 438, 454 (2002) ("If Congress meant to make a preenactment successor in interest ... liable, it could have done so clearly and explicitly.").

Similarly, Congress provided that a defendant may expressly waive her right, under 18 U.S.C. § 3161(c)(2), to be tried no sooner than 30 days after her first appearance with counsel. See 18 U.S.C. § 3161(c)(2) ("Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.") (emphasis added). In contrast, Congress chose not to allow the defendant to "consent[] in writing" (or orally) to a trial beyond

the 70-day time limit of Section 3161(c)(1). As this Court has held, "[W]hen 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" Barnhart, 534 U.S. at 452 (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

A comparison of the Speedy Trial Act with other federal speedy trial statutes further demonstrates that the Second Circuit's waiver holding is wrong. For example, as this Court noted in Hill, the Speedy Trial Act lacks the "party control" features that permit waiver of the IAD's speedy trial requirements. 528 U.S. at 117 n.2. Furthermore, the Speedy Trial Act is markedly different from the speedy trial provisions of the Federal Juvenile Delinquency Act ("FJDA"), 18 U.S.C. § 5036 (West 2005), which provides that if a juvenile is not tried within 30 days of his detention, the information "shall be dismissed." Unlike the Speedy Trial Act, the FJDA provides exceptions to this rule if the delay was "caused by" or "consented to by the juvenile or his counsel," or if the delay "would be in the interests of justice in the particular case." Id. The omission of comparable exceptions from the text of the Speedy Trial Act, passed by the same Congress that passed the FJDA, must therefore have been deliberate. Under the Speedy Trial Act, delays are not excludable even if they were "caused by" or "consented to by" the defendant, unless the court complies with the "ends of justice" requirements of Section 3161(h)(8)(A).

2. The Second Circuit's waiver rule is inconsistent with the Act's history and purposes.

As shown above, the text of the Act, construed using accepted interpretive tools, makes clear that a defendant cannot waive the Act's requirements, except as the statute expressly provides. Accordingly, resort to the Act's legislative history is unnecessary. See, e.g., Barnhill v. Johnson, 503 U.S. 393, 401 (1992) (appeals to legislative history are well taken only to resolve statutory ambiguity). Nevertheless, to the extent the legislative history is relevant, it further refutes the Second Circuit's waiver holding.

When Congress amended the Speedy Trial Act in 1979, it made clear "in the strongest possible terms" that the sole reference to "waiver" in Section 3162(a)(2) was deliberate and that any attempt by courts to engraft additional waiver rules would be "contrary to legislative intent and subversive of [the Act's] primary objective: protection of the societal interest in speedy disposition of criminal cases by preventing undue delay in bringing such cases to trial." Carrasquillo, 667 F.2d at 389 (citing S. Rep. No. 212, 96th Cong., 1st Sess. 28-29 (1979)).

The "no waiver" circuits, citing the legislative history, have correctly held that the narrow waiver provisions of the Act are exclusive. See, e.g., Saltzman, 984 F.2d at 1091; Carrasquillo, 667 F.2d at 389. The Second Circuit, in contrast, ignores this history in favor of its own determination of the "public interest." A. 15.

In summary, the Second Circuit's judicially created waiver

rule is at odds with the Act. This Court should therefore grant review to resolve the deep circuit conflict on this issue.

II.

The Second Circuit's decision to apply harmless-error analysis deepens a split in the circuits, violates the text and structure of the Act, and conflicts with this Court's decisions in United States v. Taylor, 487 U.S. 326 (1988), and Alabama v. Bozeman, 533 U.S. 146 (2001).

This Court should also grant certiorari because the circuits are in conflict over the second important issue presented by this case: Whether a violation of the Act's 70-day time limit is subject to harmless-error analysis. The Second and Seventh Circuits hold, contrary to the other ten circuits, that a violation of the 70-day limit does not require dismissal of the indictment at all, unless prejudice is shown or other "substantial rights" are affected. Because the Act's mandatory dismissal provision is "by far its most effective enforcement mechanism," Willis, 958 F.2d at 64, this Court should resolve this deep circuit split.

Moreover, this Court's review is needed because the Second Circuit's decision to apply harmless-error analysis disregards the text, structure and purposes of the Act once again. To make the Act's 70-day time limit more than precatory, Congress made a deliberate policy decision. It decided that, to deter delays, a violation of the time limit always requires that the "indictment shall be dismissed" upon request. By making dismissal mandatory, Congress precluded harmless-error analysis. Instead, Congress granted courts flexibility to dismiss without prejudice where, for example, a violation is not severe and does not cause harm. The

Second Circuit, however, by requiring dismissal only where prejudice has been shown, improperly disregarded Congress's carefully considered policy decision as expressed in the Act's text.

A. The circuits are divided over whether a violation of the Act's 70-day time limit is subject to harmless-error analysis.

The Second and Seventh Circuits hold that Section 3162(a)(2) allows a conviction to be affirmed on harmless-error grounds, even though the 70-day time limit was exceeded. A. 19; Gambino, 59 F.3d at 363; Smith, 415 F.3d 682. In contrast, every other circuit holds that Section 3162(a)(2) means what it says: that the "indictment shall be dismissed" upon request in the event of a violation.[14]

Furthermore, at least three circuits -- the Fourth, Sixth and Ninth -- have specifically held that harmless-error principles and similar prudential doctrines cannot be used to avoid the statute's mandatory remedy of dismissal. See Crane, 776 F.2d at 606; Carey,

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[14] See, e.g., United States v. Hastings, 847 F.2d 920, 924 (1st Cir. 1988) ("[T]he court must order dismissal."); United States v. Brenna, 878 F.2d 117, 118 (3d Cir. 1989) ("[T]he court must dismiss the indictment[.]"); United States v. Jones, 887 F.2d 492, 494 (4th Cir. 1989) ([T]he Act mandat[es] dismissal of an indictment."); United States v. Johnson, 29 F.3d 940, 945 (5th Cir. 1994) ("[I]n accordance with the mandate of the statute, [the] indictment must be dismissed."); United States v. Dunbar, 357 F.3d 582, 591 (6th Cir. 2004) ("[T]he Act mandates dismissal of the indictment."), vacated on other grounds, 125 S. Ct. 1029 (2005); United States v. Koory, 20 F.3d 844, 846 (8th Cir. 1994) ("[D]ismissal is mandatory[.]"); United States v. Lewis, 349 F.3d 1116, 1120 (9th Cir. 2003) ("[T]he court must dismiss the indictment[.]"); United States v. Doran, 882 F.2d 1511, 1518 (10th Cir. 1989) ("[D]ismissal of the indictment is mandatory."); United States v. Garrett, 720 F.2d 705, 707 (D.C. Cir. 1983) ("Dismissal is mandatory.").

746 F.2d at 230; Perez-Reveles, 715 F.2d at 1353-54.

In Carey, the defendant moved to dismiss on the ground that 71 non-excluded days had elapsed. 746 F.2d at 229-30. In response, the district court entered a one-day continuance nunc pro tunc based on an "ends of justice" finding, held that any violation of the Act was "harmless," and denied the motion. Id. at 230. On appeal, the Fourth Circuit ruled, in an alternative holding, that harmless-error analysis was inapplicable. "[W]e cannot accept the district court's ... ruling that the nunc pro tunc continuance was harmless error. Congress provided in Section 3162 for dismissal of the prosecution with, or without, prejudice if the time limits prescribed by the Act are not met. As Janik points out, the government's intention to seek another indictment affords no justification for refusing to impose a sanction that Congress has mandated." Id. (citing Janik, 723 F.2d at 546).[15]

In Crane, the district court declined to dismiss the indictment under the Act, finding, inter alia, that dismissal would be "judicially inefficient." 776 F.2d at 604. Much like the Second Circuit, the court reasoned that dismissal would have been "without prejudice," the government would have reindicted the defendant, and therefore "dismissal would have been useless." Id. The Sixth Circuit unanimously reversed. It held that the district court's conclusion that dismissal would have been "useless" was not a "proper justification" for not complying with the Act's

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[15] The Fourth Circuit denied the defendant relief, however, finding that the 70-day time period, properly calculated, was not exceeded.

requirements. Id. at 606. The Sixth Circuit vacated the defendant's conviction and remanded for dismissal of the indictment with or without prejudice. Id. at 607; see also Howard, 1997 WL 705077, at *6 ("We simply have found no authority to support the proposition that actual prejudice must be shown when a district court completely fails to comply with the requirements of the Speedy Trial Act.... There is no basis for such a requirement in the text or legislative history of the Speedy Trial Act, and we decline to add such a requirement.").

The Ninth Circuit has likewise held that the "shall be dismissed" language of Section 3162(a)(2) is mandatory, even if no prejudice is shown. Perez-Reveles, 715 F.2d at 1353-54. The court recognized that its role was not to question the "wisdom or peril" of the Act's strict requirements, but to enforce them:

> Whatever debate might still be open as to the wisdom or peril of imposing rigid time requirements, Congress seems carefully to have determined that a comprehensive plan for facilitating shorter pre-trial delays would promote the interests of the public, the individual, and the ends of justice. To accomplish these aims, sanctions were provided in § 3162.

Id. at 1353 (quoting United States v. Antonio, 705 F.2d 1483, 1485 (9th Cir. 1983)). The court held that the conviction could not remain in place even if, on remand, the district court were to determine that the case should be dismissed without prejudice. "A determination of dismissal without prejudice does not permit the reinstatement of the judgment and sentence ... because the applicable statutory provision in this instance [Section 3162(a)(2)] requires the dismissal of the indictment, the

foundational pleading for the criminal trial." 715 F.2d at 1353. "Therefore, if the district court should determine that the case is to be dismissed without prejudice, the judgment cannot be reinstated, but the effect of that order would be to permit retrial only after reindictment of the defendant." Id. at 1354.

In contrast, the Second and Seventh Circuits hold that Section 3162(a)(2) requires dismissal only where a violation of the 70-day period caused prejudice or affected a "substantial right" beyond the right to be tried within 70 days. A. 19; Smith. The Second Circuit first applied harmless-error analysis to the Act in Gambino. In that case, which involved a "captain" of "one of the most notorious organized crime families in the United States," 59 F.3d at 356, the Circuit held that the defendant had been tried outside the Act's 70-day period. The Circuit also held that the district court erred by declining to dismiss the indictment on the ground that any dismissal would have been "without prejudice." The Circuit held that dismissal of the indictment was "mandatory" even if that remedy might seem a "purposeless formalism" in a particular case. Id. The Circuit held that dismissal was "the sanction Congress saw fit to impose, and it was therefore the district court's duty to impose it." Id. at 363. Contradicting its own reasoning, however, the Second Circuit then affirmed Gambino's conviction on the ground that the speedy trial violation was "harmless" in his particular case. Id.

In this case, the Second Circuit expanded Gambino's harmless-error holding into a general rule: Harmless-error analysis always

applies to a violation of the Act's 70-day time period. A. 18. In effect, the Second Circuit interprets the statutory directive, "the indictment shall be dismissed," to mean that the indictment shall not be dismissed, even without prejudice, unless the defendant has been harmed by the delay.

The Seventh Circuit recently followed Zedner's harmless-error holding. In Smith, the Act's 70-day period was exceeded by a few days or by a month, "depending on one's perspective." 415 F.3d 682 (Westlaw print-out at p. 4).[16] The court nevertheless affirmed the defendant's conviction on harmless-error grounds because the defendant could not show prejudice at trial from this "minor delay:"

> Even though district courts have an unconditional obligation to enforce the Speedy Trial Act, if the district court errs and the case proceeds to judgment, then the harmless error rule applies at the appellate level.

Id. (citing Zedner, 401 F.3d at 47; Neder v. United States, 527 U.S. 1 (1999); 28 U.S.C. § 2111). While the Seventh Circuit interpreted Zedner's harmless-error rule to apply only at the "appellate level," the Second Circuit explicitly relied on the harmless-error provisions of Fed. R. Crim. P. 52(a), a rule that applies in both the district courts and the courts of appeals. See Fed. R. Crim. P. 1(a).

In short, the circuits are deeply divided over the harmless-error issue. Because the Speedy Trial Act applies automatically to every federal prosecution in the nation, see Hill, 528 U.S. at 117

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[16] Only the Westlaw citations are currently available.

n.2, and because the mandatory dismissal provisions are the central mechanism for enforcing the Act, the uncertainty generated by this conflict is intolerable and should be resolved.[17]

B. The Second Circuit's decision to apply harmless-error analysis violates the text of the Act and conflicts with this Court's decisions in Taylor and Bozeman.

This Court should also grant review because the Second Circuit's decision to apply harmless-error analysis violates the text, structure, and purposes of the Act, as analyzed in Taylor. The Second Circuit's decision is also inconsistent with this Court's interpretation of similar speedy trial language in Bozeman.

The language of Section 3162(a)(2) is clear. It provides, in pertinent part:

> **§ 3162. Sanctions**
>
> **(a)** ...
>
> **(2)** If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment **shall be dismissed** on motion of the defendant. [...] In determinating whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the

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[17] The danger of the Second Circuit's broad waiver and harmless-error principles is that courts will be tempted to apply them routinely to forgive violations of the Act's 70-day time limit. The temptation is already proving irresistible. See, e.g., Smith; United States v. Friemann, 2005 WL 1427503, at *1-*2, No. 04-5506-CR (2d Cir. Jun. 15, 2005) (unpublished) (holding that any speed trial violation was waived or was harmless) (citing Zedner); United States v. Goykhman, 2005 WL 714124, at *1, No. 04-3278-CR (2d Cir. Mar. 29, 2005) (unpublished) ("Assuming, arguendo, that there was a Speedy Trial Act violation, it was harmless.") (citing Zedner).

administration of justice.

18 U.S.C. § 3162(a)(2) (emphasis added). As this Court has recognized, "the statute admits no ambiguity in its requirement that when ... a violation [of the 70-day period] has been demonstrated, 'the information or indictment shall be dismissed on motion of the defendant.'" Taylor, 487 U.S. at 332 (quoting 18 U.S.C. § 3162(a)(2)); see also id. at 341 n.12 ("If the Government fails to try the defendant within the statutory time frame, the defendant is entitled to dismissal."). The Court added, "As is plain from th[e] language, courts are not free simply to exercise their equitable powers in fashioning an appropriate remedy[.]" Id. It follows, a fortiori, that courts cannot simply decide to impose no remedy at all.

Given the unambiguous mandate of Section 3162(a), a court may not ignore a violation of the 70-day time limit, as the Second Circuit did here, merely because the court believes that the case was tried to "satisfactory conclusion" and that dismissal would be "illogical" or cause "expense" and "inefficiency." A. 19. As this Court has declared, "It is well established that when the statute's language is plain, the sole function of the courts -- at least where the disposition of the text is not absurd -- is to enforce it according to its terms." Lamie v. United States Trustee, 540 U.S. 526, 534 (2004) (internal quotation marks and citations omitted)); see also Richards v. United States, 369 U.S. 1, 10 (1962) (courts "are bound to operate within the framework of the words chosen by Congress and not to question the wisdom of the latter in the

process of construction.").

The thirty-year history of the Speedy Trial Act, and this Court's long history of interpreting its carefully structured dismissal provisions as written, see Taylor, refute the Second Circuit's notion that there is something so patently "absurd," "perverse," or "illogical" about Section 3162(a)(2) to justify disregarding its plain text. The Second Circuit noted that a dismissal without prejudice can cause more delay in a case. But Congress did not intend for a dismissal without prejudice to somehow cure or erase delay in any given case. Rather, it made the deliberate policy judgment that mandatory dismissal, with or without prejudice, was necessary to deter violations of the 70-day time limit prophylactically. E.g., Willis, 958 F.2d at 64 ("Congress's intent in providing for the dismissal sanction was 'to serve as a deterrent for the failure of the United States Attorney or the court to comply with the Act.'") (citation omitted).

Viewed from this deterrent standpoint, the Act's mandatory dismissal provisions make perfect sense. As this Court recognized in Taylor, "Dismissal without prejudice is not a toothless sanction: it forces the Government to obtain a new indictment if it decides to reprosecute, and it exposes the prosecution to dismissal on statute of limitations grounds. Given the burdens borne by the prosecution and the effect of delay on the Government's ability to meet those burdens, substantial delay well may make reprosecution, even if permitted, unlikely." 487 U.S. at 342; see also Janik, 546 F.2d at 546 (dismissal without prejudice serves a deterrent purpose

because "the grand jury may refuse to reindict and since even if it does the defendant may be acquitted").

The Second Circuit also noted the potential costs and consequences of mandatory dismissal. But these costs and consequences -- and the certainty that they will follow if the Act's time limits are violated -- are precisely what give the dismissal sanction its deterrent effect.

The Second Circuit's decision also violates the careful structure of Section 3162(a)(2), as analyzed in Taylor. In that case, this Court held that, while prejudice to the defendant is a factor to be considered in deciding what type of dismissal must be ordered, the absence of prejudice is not "dispositive" even on that issue. 487 U.S. at 341. The Second Circuit, however, erroneously makes the prejudice factor dispositive by requiring a showing of harm before any dismissal may be ordered. If such a showing were required, Congress would not have explicitly permitted a dismissal without prejudice. The Second Circuit, however, reads this remedy out of the Act entirely.

The Second Circuit's decision also conflicts with this Court's unanimous decision in Bozeman. Bozeman held that there is no place for harmless-error analysis when a speedy trial statute contains "absolute language" mandating dismissal of the indictment as the appropriate remedy. 533 U.S. at 153-54. Bozeman, like Hill, concerned the IAD, 18 U.S.C. App. § 2 (1970), an interstate compact that creates uniform procedures for lodging and executing a detainer. 533 U.S. at 148. The IAD contains an "anti-shuttling"

provision that provides, in pertinent part, that a State that obtains a prisoner for purposes of trial must try him within 120 days of his arrival and that, if it returns him to his "original place of imprisonment" prior to that trial, the "indictment ... shall not be of any further force or effect, and **the court shall enter an order dismissing the same with prejudice**." 18 U.S.C. App. 2, § 2, Article IV(e) (emphasis added).

Bozeman held that this "absolute language" required dismissal of the indictment -- "with prejudice" -- even though the prisoner's initial imprisonment had been interrupted only for a single day. 533 U.S. at 153-54. The Court rejected the State of Alabama's position, echoed by the Second Circuit here, that a violation could be overlooked on policy grounds as "de minimis, technical, or harmless." Id. at 156. The Court held, "The word 'shall' is ordinarily 'the language of command.'" Id. at 153 (citations omitted). The Court added: "The cases Alabama cites as supporting 'harmless error' construction involved statutes that lacked this absolute language." Bozeman, 533 U.S. at 153-54 (citing, inter alia, United States v. Montalvo-Murillo, 495 U.S. 711, 716-17 (1990) (Bail Reform Act "is silent on the issue of a remedy for violations of its time limits")).

Bozeman thus demonstrates that the Second Circuit's harmless-error rule cannot stand. The IAD and the Speedy Trial Act both provide time frames in which the government must bring criminal defendants to trial. Although the two statutes differ with respect to waiver, see Hill, 528 U.S. at 117 n.2, they contain very similar

language with respect to remedy. Like the mandatory dismissal provisions of the IAD at issue in Bozeman, the pertinent language of the Speedy Trial Act is "absolute." It says that the "indictment shall be dismissed." 18 U.S.C. § 3162(a)(2). The harmless-error cases cited by the Second Circuit, in contrast, all concerned statutory provisions that lack this absolute language, as the court itself acknowledged. A. 18.

The Second Circuit also erroneously relied upon the general harmless-error provisions of 28 U.S.C. § 2111 and Fed. R. Crim. P. 52(a). Nothing in these provisions supplants the Act's specific language mandating dismissal. Indeed, the United States Solicitor General specifically cited Section 2111 and Rule 52(a) to this Court in Bozeman to support the application of harmless-error analysis in that case, but not a single Justice was persuaded. See Brief of the United States as Amicus Curiae in Support of Petitioner at 23, Bozeman (No. 00-492). Rule 52(a) and Section 2111, provisions of general application, do not permit a court to disregard the specific remedy mandated by the Speedy Trial Act itself. See, e.g., Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific [provision] governs the general.").

The Second Circuit's holding also undermines the central legislative compromise embodied in Section 3162(a)(2). See Taylor, 487 U.S. at 333-36. Early drafts of the Act required dismissal only "with prejudice." H.R. 7107, 92d Cong., 1st Sess. (1971); S. 895, 92d Cong., 1st Sess. (1971). This inflexible sanction

generated much controversy in Congress, with proponents arguing that an absolute bar to re-prosecution was essential to ensure compliance with the Act's time periods and opponents arguing that this sanction was too harsh and unfair. Taylor, 487 U.S. at 334 (citations omitted). "Eventually, in order to obtain passage of the Act, a compromise was reached that incorporated, through amendments on the floor of the House of Representatives, the language that eventually became § 3162(a)(2)." Id. at 334-35 (citation omitted). The mandatory dismissal sanction was retained, but Congress granted courts flexibility to dismiss "without prejudice" for minor violations where, for example, the defendant was not harmed by the delay. The Second Circuit, however, by allowing no dismissal at all unless prejudice has been shown, violated its duty to "ensure that the purposes of the Act and the legislative compromise it reflects are given effect." Id. at 337.

In summary, the Speedy Trial Act as construed by the Second Circuit bears little resemblance to the "plain-speaking" Act passed by Congress and signed by President Ford. Blackwell, 12 F.3d at 46. By injecting amorphous rules of implied waiver and harmless error into the Act, the court has eviscerated the statute's text and structure, weakened its effectiveness, and undermined its central purpose of ensuring the prompt disposition of criminal cases. As the Justice Department advised Congress during the 1971 Senate hearings:

> [I]t may well be ... that the whole system of federal criminal justice needs to be shaken by the scruff of its neck and brought up short with a relatively peremptory instruction to prosecutors,

> defense counsel, and judges alike that criminal cases must be tried within a particular period of time. That is certainly the import of the mandatory dismissal provisions of your bill.

Prepared Statement of Assistant Attorney General William H. Rehnquist, Speedy Trial: Hearings on S. 895 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 92d Cong., 1st Sess. at 107 (1971) (cited in Partridge, supra, at 17).

Accordingly, this Court should review the Second Circuit's broad rulings on the two issues presented. Those rulings, which extend far beyond the facts of this particular case, exacerbate a conflict among the courts of appeals, contravene the Act's text and purposes, and disregard this Court's precedents. This Court's intervention is necessary to ensure that the Act is enforced consistently across the country in accordance with its plain terms.

Conclusion

The writ of certiorari should be granted.

Dated: New York, New York
August 22, 2005

Respectfully submitted,

Edward S. Zas

Counsel of Record

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APPENDIX

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[redacted]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 24 day of May two thousand five.

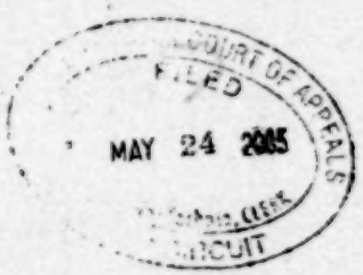
United States of America,

Appellee,

v. Docket # 04-0821

Jacob Zedner,

Defendant-Appellant.



A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Jacob Zedner. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk

By: Tracy W. Young
Motion Staff Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2003

(Argued: April 28, 2004 Decided: March 8, 2005
Errata Filed: March 15, 2005
2nd Errata Filed: March 23, 2005)

Docket No. 04-0821-cr

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UNITED STATES OF AMERICA,

Appellee,

-v.-

JACOB ZEDNER,

Defendant-Appellant.

----------X

Before: LEVAL and RAGGI, *Circuit Judges*, and STEIN, *District Judge*.*

Appeal from a judgment of the United States District Court for the Eastern District of New York (Thomas C. Platt, *J.*) convicting Defendant-Appellant Jacob Zedner of attempting to defraud a financial institution in violation of 18 U.S.C. § 1344, and sentencing him to 63 months' imprisonment. The Court of Appeals (Leval, *J.*) holds that (1) any Speedy Trial Act error was harmless; (2) Speedy Trial Clause of the Constitution was not violated; (3) district court did not abuse its discretion in admitting evidence of other bad acts; (4) the conscious avoidance charge did not constitute plain error; and (5) substantial risk existed that district court misapprehended

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* The Honorable Sidney H. Stein, United States District Judge for the Southern District of New York, sitting by designation.

its authority to depart downward. Conviction AFFIRMED. Sentence VACATED and REMANDED.

Stephen C. King, Assistant United States Attorney for the Eastern District of New York (Roslynn R. Mauskopf, United States Attorney, Emily Berger, Assistant United States Attorney, on brief), Brooklyn, NY, for *Appellee*.

Edward S. Zas, The Legal Aid Society, Federal Defender Division, Appeals Bureau, New York, NY, for *Defendant-Appellant*.

LEVAL, *Circuit Judge*:

Jacob Zedner appeals from his conviction after a jury trial in the United States District Court for the Eastern District of New York (Thomas C. Platt, *J.*) on six counts of attempting to defraud a financial institution in violation of 18 U.S.C. § 1344. Zedner claims, *inter alia*, that (1) lapses of time between the indictment and the start of trial violated his statutory and constitutional rights to a speedy trial; (2) the district court abused its discretion when it admitted evidence of his other bad acts; (3) the district court charged the jury incorrectly on conscious avoidance; (4) the court erred in the calculation of intended loss under U.S.S.G. § 2F1.1; (5) the district court misapprehended its authority to depart downward for diminished mental capacity and the loss amount's overstatement of the seriousness of the offense; and (6) the court erred in following the United States Sentencing Guidelines, which unconstitutionally deprive the defendant of the right to a jury trial. We reject contentions (1) through (4); we agree with defendant's contention (5), which requires resentencing and moots contention (6).

BACKGROUND

In March 1996, Jacob Zedner approached a number of financial institutions to open an

account using a counterfeit $10 million bond, ostensibly issued by the non-existent "Ministry of Finance of U.S.A." The bond contained numerous spelling mistakes and other errors.

The institutions uniformly refused to open an account for Zedner. One called the United States Secret Service, which arrested Zedner on March 12, 1996. A consensual search of Zedner's briefcase revealed three additional counterfeit bonds, each in the amount of $10 million, which, like the one he attempted to negotiate, were replete with mistakes.[1] The grand jury indicted Zedner on April 4, 1996 on various counts of attempting to defraud a financial institution in violation of 18 U.S.C. § 1344, and one count of knowingly possessing counterfeit bonds in violation of 18 U.S.C. § 472.

At the first status conference on June 7, 1996, Zedner's then-attorney failed to appear, and the district court entered an order excluding the delay until the next conference on June 21, 1996, under the Speedy Trial Act, 18 U.S.C. §§ 3161-3174. At the second status conference, Zedner failed to appear, and the proceedings were again delayed until June 26, 1996. On June 26, the court entered an order excluding delay from June 26 through September 6, 1996, by reason of the complexity of the case. On September 6, the case was again adjourned, and the court excluded the delay until November 8, 1996.

On November 8, Zedner requested an adjournment of the case through the end of January. Because the court had lengthy trials pending, the judge expressed concern that Zedner might attempt to invoke speedy trial rights at an inconvenient time and insisted on a "waiver for all

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[1] Some of the bonds referred to the United States as the "Onited States" and "Thunted States," misspelled Philadelphia as "Dhtladelphia," misspelled Chicago as "Cgicago," referred to the month August as "Augit" and "Auouit," misspelled the word dollar, and claimed to have a duration of "forevev."

time" as a condition of granting the adjournment Zedner requested. The court advised Zedner of his rights, and Zedner executed a written waiver. The district court then entered an order of adjournment to January 31, 1997. Presumably because Zedner had signed a waiver of rights under the Speedy Trial Act "for all time," the judge entered no more orders of exclusion for the duration of the case.

On January 31, 1997, the government answered ready for trial, but Zedner's counsel requested another delay. The district court granted the request and scheduled jury selection for May 5. On May 2, Zedner's counsel, James Hagney, Esq., requested to be relieved on the ground that Zedner wished to assert a defense at trial that counsel believed not to have a "basis in law or fact," namely that the bonds were genuine. The court initially denied Hagney's motion but asked a representative of the Federal Defender Division of the Legal Aid Society to serve as advisory counsel. After Zedner's subsequent completion of a financial affidavit, the court relieved Mr. Hagney and appointed the Federal Defender Division of the Legal Aid Society as Zedner's counsel.

At the May 2 hearing, the court asked Zedner whether he would be willing to submit to a psychiatric examination. With Zedner's consent, the government arranged for an examination, and the court postponed the trial date while awaiting the psychiatrist's report. The psychiatrist issued her report on August 5, 1997, concluding that Zedner was competent to stand trial.

At a status conference on September 8, 1997, Zedner complained about his new attorney and asked to represent himself without an attorney. The court authorized Zedner to proceed *pro se* with the Federal Defender Division of the Legal Aid Society serving in an advisory capacity. Zedner then sought to serve subpoenas on numerous high government officials including

President Clinton, Federal Reserve Chairman Alan Greenspan, Attorney General Janet Reno, and Secretary of State Madeleine Albright. While a magistrate judge was considering various motions to quash Zedner's subpoenas, Zedner moved to dismiss the indictment on the grounds that the government had violated his civil rights and that the agents who investigated him were guilty of treason.

At the status conference on December 17, 1997, the court once again scheduled jury selection, for February 17, 1998. However, on January 30, 1998, Zedner asked the court to adjourn the trial date to allow him to serve additional subpoenas on "The Treasury Department of Treasury International Corporation" and other nonexistent entities. Over the next eight months, the court granted many motions to quash subpoenas while Zedner continued to file motions and request subpoenas for parties unconnected to his case. On October 8, 1998, the court scheduled jury selection for October 14.

The morning the trial was scheduled to begin the court consulted with counsel in chambers while a jury panel waited. The court expressed concern that Zedner was mentally ill. The government disagreed, but moved for a psychiatric examination under 18 U.S.C. § 4241(a) in order to allay the court's concerns. The court dismissed the jury panel and inquired into Zedner's competency, concluding that Zedner was not competent to stand trial. Several days later the court ordered Zedner committed to the custody of the Attorney General for hospitalization and treatment pursuant to 18 U.S.C. § 4241(d). Zedner filed an interlocutory appeal, and in *United States v. Zedner* (*Zedner I*), 193 F.3d 562 (2d Cir. 1999) (per curiam), we vacated the order of commitment and remanded for a new competency hearing on the ground that a competency hearing of a person whose competence is reasonably doubted should not proceed

with that person acting as his own attorney.

The district court convened a status conference on April 4, 2000, but only the government appeared. At the rescheduled status conference held on April 27, 2000, the government and Tracey Gaffey, Esq. of the Federal Defender Division of the Legal Aid Society, now acting on Zedner's behalf, jointly requested that the court schedule the new competency hearing for July 10, 2000. The court complied, and the hearing was held as scheduled in July. At the close of the hearing, the court invited the parties to submit additional briefs on the issue of Zedner's competency. Ms. Gaffey submitted a brief on August 4 arguing that Zedner was competent to stand trial and requesting that the court schedule the case for trial "as soon as possible." The government filed a letter brief on August 11, 2000 taking the position that Zedner was incompetent to stand trial. Zedner filed a *pro se* brief on August 23, 2000.

In November, however, while the competency motion was on submission, Ms. Gaffey became unavailable to try the case for medical reasons relating to her pregnancy. Assistant U.S. Attorney Leonard Lato explained in a later affidavit that he received a phone call in late November 2000 from the Federal Defender Division of the Legal Aid Society informing him that "Ms. Gaffey would be out of the office for a few weeks for reasons related to her pregnancy." Lato was subsequently advised that "Ms. Gaffey was unlikely to return until some time after Ms. Gaffey gave birth." A month later, Lato discussed Zedner's case with Gaffey and the two agreed that the case did not require immediate attention.[2] On March 7, 2001, Zedner moved to dismiss the indictment with prejudice under the Speedy Trial Act and the Speedy Trial Clause of the

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[2] Although the record apparently is silent on the subject, we can confidently assume that the trial court was notified of the fact of Ms. Gaffey's prolonged unavailability.

Sixth Amendment. The court issued a memorandum order on March 21, 2001 denying Zedner's motions on the grounds that the case was complex and Zedner had waived his speedy trial rights "for all time."

Returning to the issue that was submitted to the court by the August briefing, the court found Zedner incompetent to stand trial and ordered him to surrender to the Attorney General for commitment. Zedner appealed, and we affirmed. *United States v. Zedner* (*Zedner II*), 29 Fed. Appx. 711 (2d Cir. Feb. 21, 2002).

In May 2002, Zedner entered a federal medical facility for psychological evaluation. Near the end of his commitment, Zedner moved to extend his stay by 90 days to allow for a more comprehensive evaluation. On August 27, 2002, Zedner was released. The institution's report found that Zedner was delusional but competent to stand trial. The district court accepted the report and scheduled jury selection to begin on April 7, 2003.

The trial focused primarily on Zedner's state of mind with respect to six efforts to open a bank account using a bogus bond. The government called representatives from the various financial institutions Zedner had approached, as well as a Secret Service agent, who testified that at the time of his arrest Zedner possessed credit cards and calling cards in at least five different names. Representatives of Citibank and American Express testified that the cards had uncollectible balances exceeding $13,000. In an effort to prove absence of fraudulent intent, the defense called as its only witness a psychologist who testified that Zedner suffered from a delusional disorder and genuinely believed the bonds he possessed were authentic. The government called two rebuttal witnesses. Both witnesses told similar stories of contacting Zedner in 1988 seeking assistance in the refinancing of a mortgage on her home. In each

instance, Zedner transferred title to the home into his own name. Each witness testified that she had been obligated to sue to recover title to her house.

The jury convicted Zedner on six counts of fraud, each representing a separate attempt to open a financial account funded by a phony bond. In the presentence report, the Probation Department, using the 1995 version of the Guidelines Manual, which was in effect at the time of Zedner's crime, determined that his base offense level was 6. It recommended adding two offense levels for more than minimal planning pursuant to U.S.S.G. § 2F1.1(b)(2)(A) and seventeen levels pursuant to U.S.S.G. § 2F1.1(b)(1)(R) based on a total intended loss of $40,013,285.19.

Zedner challenged the loss calculation. He also moved for a downward departure on grounds of diminished mental capacity and that the aggregate intended loss overstated the seriousness of his offense.

The court denied all of Zedner's motions. With respect to intended loss, the court set the level at approximately $60 million based on Zedner's six attempts to pass off a bond with a face value of $10 million. The court declined to grant a downward departure, explaining on the issue of diminished capacity that the jury had rejected the argument that, by reason of his delusions, Zedner did not possess the requisite *mens rea* during the commission of his crime. The court sentenced Zedner to 63 months in prison, with credit for time served during his competency exam, and 5 years of supervised release. It also imposed a mandatory special assessment of $300.

Zedner then brought this appeal.

DISCUSSION

I. Speedy Trial Act

Zedner claims that his rights under the Speedy Trial Act were violated based on two periods of delay: (1) January 31, 1997 until May 2, 1997, during which the district court entered no order of exclusion while postponing trial at Zedner's request; and (2) August 11, 2000 until March 7, 2001, a period in which Zedner's competence to stand trial was in question and Zedner's attorney became unavailable because of pregnancy complications. As to both periods, we reject Zedner's contentions.

The Speedy Trial Act provides that the trial of a defendant must commence within seventy days from the date he is indicted or brought before a judicial officer, whichever occurs later, 18 U.S.C. § 3161(c)(1), failing which § 3162(a)(2) directs dismissal of the indictment. In counting the passage of seventy days, however, the district court may exclude certain periods of time as specified in § 3161(h). For example, the speedy trial calculation does not include "delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant," § 3161(h)(1)(A); "delay resulting from any interlocutory appeal," § 3161(h)(1)(E); certain delay related to pretrial motions, § 3161(h)(1)(F); reasonable delays up to 30 days while any question is under advisement, § 3161(h)(1)(J); "[a]ny period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial," § 3161(h)(4); or any period of delay for which the district court finds on the record that the "ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial," § 3161(h)(8). Although seven years passed between Zedner's indictment and the start of his trial, most of the delay falls squarely within one of these statutory

grounds for exclusion.

The exclusions contained in §§ 3161(h)(1)-(7) are, for the most part, self-executing, but § 3161(h)(8) provides that no exclusion based on the "ends of justice" shall be valid "unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." The district court followed this procedure throughout 1996, entering several orders of exclusion based on the failure of Zedner's counsel to appear, the failure of Zedner to appear, and the complexity of the case. After several continuances, however, the court grew concerned that Zedner might invoke the delays he caused or requested as the basis for a motion to dismiss the indictment under the Speedy Trial Act. When counsel for Zedner requested a three-month adjournment of the case in November 1996, the district court responded, "I think if I'm going to give you that long an adjournment, I will have to take a [speedy trial] waiver for all time. . . . I have some big cases and if I get bogged down with them you may be a long while before you get a trial." The defendant agreed to the request. His counsel assured the court, "We'[ll] waive for all time. That will not be a problem. That will not be an issue in this case." Thereafter, the court spoke directly to Zedner. It informed him, "I'm prepared to start your trial right away," and warned, "I have some fairly big cases pending in my docket, one of which is set to take eight months for trial. If you get locked in, if that starts before you start, you may have to wait until that is done." Zedner then executed both an oral and written waiver of his speedy trial rights "for all time." Thereafter, the district court did not enter any orders of exclusion based on its assumption that the waiver "for all time" removed all speedy trial issues from the case.

A. Period from January 31, 1997 to May 2, 1997

Zedner alleges that the lapse of over 90 days between January 31, 1997 to May 2, 1997 (a period which exceeds the seventy days allowed by the Act) requires dismissal of the indictment. In denying Zedner's motion under the Speedy Trial Act, the district court relied on Zedner's waiver of his speedy trial rights "for all time." However, in *United States v. Gambino*, 59 F.3d 353 (2d Cir. 1995), we ruled, like other circuits, that a defendant's waiver of rights under the Speedy Trial Act may be ineffective. *Id.* at 360. We observed that the public has a strong and independent interest in the expeditious prosecution of criminal cases. That public interest would be undermined if the provisions of the Act intended for the public benefit could be routinely nullified by a defendant's waiver.

At the same time, however, in an effort to reach a reasonable balance between the interests of the public and of the defendant, we recognized in dictum an exception to the non-waiver rule "when defendant's conduct causes or contributes to a period of delay." *Id.* Such an exception had been previously crafted by the First Circuit in *United States v. Pringle*, 751 F.2d 419, 434 (1st Cir. 1984). In *Pringle*, a defendant sought three continuances. The third motion stated that the defendants "waive their rights to a speedy trial." *Id.* at 433. The district court granted the motion and scheduled trial for two months later. *Id.* However, the trial was not held, and an additional five months passed before the filing of a motion stopped the speedy trial clock. *Id.* at 434. The record contained no explanation for the delay, and the First Circuit remanded the case to determine the cause. *Id.* at 436. It instructed the district court to exclude the five-month period from the speedy trial calculation if the district court determined on remand that the defendants' request for delay and purported waiver had induced the delay. *Id.* at 435. The First

Circuit expressed concern that a contrary ruling would reward the defendants because "[i]n essence, defendants would have successfully worked both sides of the street, lulling the court and prosecution into a false sense of security only to turn around later and use the waiver-induced leisurely pace of the case as grounds for dismissal." *Id.* at 434.

The Seventh Circuit aired similar reasoning in *United States v. Kucik*, 909 F.2d 206 (7th Cir. 1990). As an alternative holding rejecting the defendant's speedy trial claim, the court explained, expressing approval of *Pringle*, that a defendant who "actively participates in a continuance" cannot "then 'sand-bag' the court and the government by counting that time in a speedy trial motion." *Id.* at 211.

The Fifth Circuit rejected that reasoning in *United States v. Willis*, 958 F.2d 60 (5th Cir. 1992). Willis, who was unrepresented by counsel at the time, requested additional time to prepare for trial and, at the prompting of the district court, waived his speedy trial rights. *Id.* at 62. The district court then granted an open-ended continuance until Willis indicated he was ready for trial. Willis later moved to dismiss the indictment based on the resulting period of delay. Despite earlier Fifth Circuit dictum approving of *Pringle*, *see United States v. Kington*, 875 F.2d 1091, 1108 (5th Cir. 1989), the court expressed concern that a broad exception would swallow the non-waiver rule. It agreed that "the defendant should not be allowed to argue one legal theory or characterization of facts to obtain a continuance and then argue that the district court's ruling was erroneous to seek dismissal under the Act." *Willis*, 958 F.2d at 64. But it concluded that a "district court is not sandbagged or otherwise misled . . . by a defendant's simple request for or acquiescence in a continuance and its own insistence upon a waiver." *Id.* The court worried that the non-waiver rule would be "meaningless if . . . the defendant waives

his ability to move for dismissal of the indictment simply by asking for or agreeing to a continuance." *Id.* It therefore charged district courts with the responsibility of ensuring that any request for a continuance, even one sought or agreed to by the defendant, fall within one of the exceptions contained in the Speedy Trial Act. *Id.*

The Fourth Circuit adopted yet another approach in *United States v. Keith*, 42 F.3d 234 (4th Cir. 1994). The delay in *Keith* came about when the Assistant United States Attorney fell ill several days before trial was scheduled to start. *Id.* at 236. The district court granted the government's motion for a continuance in a written order that was signed by defense counsel as "[s]een and agreed." *Id.* (alteration in original). The defense attorney later reversed course and moved to dismiss the indictment on speedy trial grounds immediately before the rescheduled trial was set to begin. After concluding that the order granting the continuance failed to meet the procedural requirements of the § 3161(h)(8) "ends of justice" exception, the Fourth Circuit turned its attention to the question of whether the defendant could use the delay acquiesced to by his counsel in support of his Speedy Trial Act claim. *Id.* at 238. The Fourth Circuit expressed concern about the breadth of the rule announced in *Pringle* and *Kucik*, which "would appear to find a waiver when a defendant consents to a continuance occasioned on *any* reason, including the district judge's desire to go fishing." *Id.* at 239. At the same time, the Fourth Circuit characterized the rule in *Willis* as "too narrow." *Id.* The Fourth Circuit instead adopted a middle position, concluding that "if a defendant affirmatively consents to a motion for a continuance and the reasons for the granting of that motion as garnered from the record are sufficient to support a finding that the ends of justice would be met by granting the motion, the defendant cannot take advantage of that discrete period of time covered by the continuance in asserting a violation of

the Speedy Trial Act." *Id.* at 240.

We agree with the Fourth Circuit that the approach taken by the Fifth Circuit in *Willis* does not strike the right balance. We very much doubt that the public interest in expeditious prosecution would be served by a rule that allows defendants to request a delay and then protest the grant of their request. In our view the public interest is not advanced either by allowing such a defendant to escape prosecution altogether, or by dismissing the indictment and reindicting with consequent wasteful reprosecution after a substantial additional delay. *But see United States v. Janik*, 723 F.2d 537, 546 (7th Cir. 1983).

We need not define the exact scope of the exception to the non-waiver rule in order to decide the case before us. At the very least, when a defendant requests an adjournment that would serve the ends of justice, that defendant will not be heard to claim that her Speedy Trial rights were violated by the court's grant of her request, regardless whether the court made an "ends of justice" finding under § 3161(h)(8).

On January 31, 1997, the government stated that it was ready to proceed to trial. Counsel for Zedner, however, indicated that he was not ready for trial and requested a continuance. The court granted the request and delayed jury selection until May 5, 1997. Given the complexity of the case and Zedner's reasonable need for additional preparations, there can be no doubt that the district court could have properly excluded this period of time based on the ends of justice. Zedner therefore cannot establish a Speedy Trial Act violation based on the grant of the delay he requested. His claim regarding January 31, 1997 to May 2, 1997 fails.[3]

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[3] Notwithstanding this ruling, district courts contemplating adjournment of trial are far better advised to make prospective "ends of justice" findings under § 3161(h)(8), where appropriate, rather than to rely on defendant waivers. Reliance on waivers "for all time" seems

B. Period from August 2000 to March 7, 2001

Zedner also alleges that the court's failure to start his trial between August 2000 and March 7, 2001, requires dismissal of the indictment. We reject his contention. Zedner could not have been tried in this period, for two reasons.[4]

First, as noted above, beginning in late November 2000, Zedner's counsel Ms. Gaffey became unavailable for trial by reason of complications resulting from her pregnancy. Ms. Gaffey's Federal Defender office advised the AUSA first that she would be out for a few weeks, and later that her unavailability would continue until some time after she gave birth. The court could not have started trial at a time when the defendant's lawyer would have been unavailable to participate.[5]

In addition, Zedner could not have been tried in this period because he was not competent to stand trial. The question of his competence was submitted in August 2000. The court held the matter under advisement for some time, but eventually found Zedner incompetent and ordered him committed. We affirmed that decision on appeal. *Zedner II*, 29 Fed. Appx. at 713. No court conferences were held during this time, perhaps because the court considered it useless to convene a conference knowing that Zedner's counsel would not be able to appear.

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particularly inadvisable. *See Gambino*, 59 F.3d at 359-60.

[4] We note in passing that the first thirty days after the August 23 filing of Zedner's *pro se* brief addressing his competency to stand trial clearly fall under 18 U.S.C. § 3161(h)(1)(J), which excludes "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court."

[5] Of course, a district court has discretion to replace a court-appointed attorney whose unavailability will be extensive. Similarly, it may require a defendant whose retained counsel is unavailable to defend a case on the reasonable schedule established by the court to secure the services of another attorney.

It might be argued on Zedner's behalf that this time during which he was not competent may not be excluded because, so far as the record reflects, the delay did not *result from* the fact that he was incompetent. Section 3161(h)(4) excludes "[a]ny period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial." The argument might be made that the court's failure either to make a record that the delay resulted from the defendant's incompetence or to start trial was at least potentially a technical violation of the Act.

The question would then be whether a defendant is entitled to have his conviction voided and the indictment dismissed by reason of the court's failure to begin trial at a time when the court could not have begun trial because the defendant was incompetent, as well as because the defendant's counsel was unavailable for trial. The failure to start trial when the defendant could not have been tried was, at worst, a harmless, technical error, and, in our view, cannot justify vacating the conviction and dismissing the indictment.

Zedner argues that a violation of the Speedy Trial Act's 70-day period for bringing a defendant to trial cannot be deemed harmless, and that dismissal of the indictment is the mandatory remedy for any violation of the statute. We disagree. As explained below, recognition of the distinction between harmless error and error affecting substantial rights furthers, rather than detracts from, the purposes of the Speedy Trial Act.

While it is true that, in some speedy trial cases, we have directed dismissal of the indictment without discussing harmless error analysis, *see, e.g.*, *United States v. Kelly*, 45 F.3d 45, 48 (2d Cir. 1995) (per curiam) (remanding to district court to determine whether dismissal should be with or without prejudice); *United States v. Simmons*, 786 F.2d 479, 486 (2d Cir. 1986)

(instructing district court to dismiss indictment without prejudice); *United States v. Tunnessen*, 763 F.2d 74, 79 (2d Cir. 1985) (dismissing indictment without prejudice), we held in *Gambino* that the failure to bring the defendant to trial within 70 non-excludable days from the filing of the indictment constituted harmless error. 59 F.3d at 363. In addition, at least three circuits have required a showing of prejudice when reviewing alleged violations of the Speedy Trial Act's requirement that defendants be given at least 30 days to prepare between indictment and the start of trial. *See, e.g., United States v. Edwards*, 211 F.3d 1355, 1358 (11th Cir. 2000); *United States v. Cisneros*, 112 F.3d 1272, 1277 n.3 (5th Cir. 1997); *United States v. Grosshans*, 821 F.2d 1247, 1252-53 (6th Cir. 1987).

We acknowledge that these precedents do not necessarily resolve the question. There are differences. In *Gambino* the defendant had conceded that reindictment "would have been inevitable" following dismissal of the original indictment without prejudice. *Gambino*, 59 F.3d at 363. Furthermore, the exercise of statutory interpretation in the case of a violation of the 30-day preparation period required by § 3161(c)(2) is not precisely identical to that for violation of the 70-day requirement of § 3161(c)(1). Section 3162(a)(2) provides on its face that the "indictment . . . shall be dismissed" if the "defendant is not brought to trial within the time limit required by 3161(c)." The Speedy Trial Act does not contain a remedy expressly directed to failure to allow the defendant 30 days for preparation as required by § 3161(c)(2).

Nonetheless, we conclude that harmless error analysis is appropriate in Speedy Trial Act cases because of that statute's relationship to other governing statutes and rules (as well as because Congress could not reasonably have intended the absurd results that otherwise follow). Section 2111 of Title 28, United States Code, instructs appellate courts to "give judgment . . .

without regard to errors or defects which do not affect the substantial rights of the parties." Federal Rule of Criminal Procedure 52(a) similarly instructs courts to disregard "[a]ny error, defect, irregularity, or variance that does not affect substantial rights." The Speedy Trial Act does not indicate that these normative principles should be disregarded, and we can see no reason why they should be.

There are excellent reasons to distinguish between errors under the Speedy Trial Act that are harmless and those that are harmful. Delay unquestionably can be prejudicial to an accused defendant. It can result in faded or lost memories, or even the death or other unavailability of witnesses. Likewise, in some circumstances, delay can be prejudicial to the public interest protected by the Act. On the other hand, failure to consider the harmlessness of certain errors under the Speedy Trial Act can result in perverse outcomes, including allowing serious crimes to go unpunished, and causing the objective of the Act to expedite the administration of criminal justice to be undermined. A case tried to a satisfactory conclusion a few days later than the Act specifies, without substantial adverse effect on anyone, can require costly retrial a year or more later, after appeal, dismissal of the indictment, and reindictment, in a manner causing vast expense, inefficiency, unfairness, and unjustifiable delay in the administration of criminal justice. We see no reason to believe Congress intended such illogical results.

Absent a clear indication to the contrary, we believe the Speedy Trial Act should be interpreted, like other laws, to operate consistently with the overriding prescription of 28 U.S.C. § 2111 that courts should disregard defects that do not affect substantial rights.

Needless to say, the availability of harmless error analysis does not trivialize the Act's concerns. Furthermore, as we cautioned in *Gambino*, "our holding is not a signal that affirmance

of a district court's failure to dismiss an indictment on harmless error grounds . . . will routinely follow. On the contrary, since we review the question of prejudice *de novo*, nondismissal in the event of a violation will always risk nullifying an entire trial." *Gambino*, 59 F.3d at 363.

The question we face is whether Zedner is entitled to have his conviction vacated and the indictment dismissed by reason of the court's failure to start trial during a period when trial could not have been conducted – because Zedner was not competent to stand trial and Zedner's counsel was not available. Zedner has failed to put forth any convincing argument that this delay prejudiced him at his trial.[6] We conclude without hesitation that the error, if any, was harmless and that Zedner is not entitled to Speedy Trial Act relief on that account.

II. Speedy Trial Clause

In addition to his claims under the Speedy Trial Act, Zedner also argues that his rights under the Speedy Trial Clause of the Sixth Amendment have been violated by the seven-year delay between indictment and trial. In *Barker v. Wingo*, 407 U.S. 514 (1972), the Supreme Court identified four factors relevant to determining whether the Speedy Trial Clause of the Sixth Amendment has been violated: (1) length of the delay; (2) the reason for the delay; (3) whether and how the defendant asserted the speedy trial right; and, (4) prejudice to the defendant. *Id.* at 530. The Court cautioned that "these factors have no talismanic qualities; courts must still

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[6] Zedner complains that he was prejudiced when the government impeached the psychologist who testified as the only witness on Zedner's behalf on the ground he had not examined Zedner until years after Zedner committed his crime. The problem with this argument is that the psychiatrist examined Zedner on May 5, 2000, three months *before* the period of delay of which Zedner complains, and therefore any prejudice cannot be attributed to the district court's failure to rule expeditiously in August 2000.

engage in a difficult and sensitive balancing process." *Id.* at 533. We conclude that there was no violation of the Speedy Trial Clause of the Sixth Amendment.

It is true that the first factor, length of the delay, favors Zedner, *see United States v. New Buffalo Amusement Corp.*, 600 F.2d 368, 377 (2d Cir. 1979) (54-month delay "is unquestionably substantial"), but the second factor, the reasons for the delay, weighs heavily against him. Most of the delay between indictment and trial was caused by Zedner's own requests for delay, his attempts to subpoena prominent persons and fictitious entities, the need to determine his competency to stand trial, Zedner's incompetency for a time, and two interlocutory appeals taken by him. *See United States v. Vasquez*, 918 F.2d 329, 338 (2d Cir. 1990) (citing defendant's various pretrial motions as reason weighing against defendant); *see also United States v. Mills*, 434 F.2d 266, 271 (8th Cir. 1970) (holding "that delays encountered in bringing a defendant to trial who claims to be incompetent or who is temporarily incompetent ordinarily do not infringe upon his Sixth Amendment right to a speedy trial," and citing, *inter alia*, *United States v. Davis*, 365 F.2d 251 (5th Cir. 1966); *Johnson v. United States*, 333 F.2d 371, 374 (10th Cir. 1964)).

The third factor, whether and how the defendant asserted the speedy trial right, also weighs against Zedner. For several years, Zedner repeatedly requested continuances. His request to be tried "as soon as possible" did not come until August 2000, nearly four-and-a-half years after his indictment. *See United States v. Jones*, 91 F.3d 5, 8-9 (2d Cir. 1996) (failure to assert right for four months after indictment weighs against defendant).

The fourth and final factor, prejudice to the defendant, also weighs against Zedner. Prejudice "should be assessed in the light of the interests . . . the speedy trial right was designed to protect. . . . : (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and

concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Id.* at 532. Of these interests, "the most serious is the last." *Id.* Zedner was not incarcerated prior to trial and his bail conditions were not particularly onerous. He undoubtedly experienced anxiety, but the record contains no indication that the anxiety was acute. There is no indication that Zedner's ability to mount an effective defense was seriously impaired. Indeed, much of the pretrial delay resulted from the wide latitude the district court granted Zedner to prepare his defense.

Balancing the four factors identified in *Barker*, we conclude that Zedner's Sixth Amendment right to a speedy trial was not violated. The gap between indictment and trial was long, but the major part of the delay resulted from his requests for delay and serious problems concerning his competency to be tried.

III. Rule 404(b) Evidence

Zedner claims the district court abused its discretion by admitting testimony of two rebuttal witnesses to the effect that Zedner committed frauds in 1988. The first witness testified that, when she sought Zedner's help to refinance her mortgage, he transferred the deed to her home into his own name. She had to file a lawsuit to regain title. The second witness also approached Zedner for help refinancing her mortgage. She consented to a dummy sale of her house to Zedner with the understanding that he would refinance the house in his own name to overcome her bad credit rating and then return the house to her. When Zedner asserted full ownership, the witness sued to recover title.

Federal Rule of Evidence 404(b) provides that prior act evidence "is not admissible to

prove the character of a person in order to show action in conformity therewith," but "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." This court considers four factors to determine whether evidence was properly admitted under Rule 404(b): "whether (1) it was offered for a proper purpose; (2) it was relevant to a material issue in dispute; (3) its probative value is substantially outweighed by its prejudicial effect; and (4) the trial court gave an appropriate limiting instruction to the jury if so requested by the defendant." *United States v. LaFlam*, 369 F.3d 153, 156 (2d Cir. 2004) (per curiam). This evidence of fraud was offered for a proper purpose and was relevant. Zedner based his defense on the claim that he was delusional and lacked criminal intent because he did not know the bonds were counterfeit. Testimony about his other fraudulent acts tended to prove Zedner's financial sophistication, his ability to execute complex schemes, and his ability to form intent to defraud. *See United States v. Downing*, 297 F.3d 52, 59 (2d Cir. 2002). Although admission of other bad act evidence runs the risk that the jury will punish the defendant for the other actions rather than the charged offense, the probative value of the evidence outweighed any prejudice. Moreover, the district court reduced any risk of unfair prejudice with a carefully worded limiting instruction. Accordingly, we conclude that the district court did not err, much less abuse its discretion, when it admitted this evidence of fraud.

IV. Conscious Avoidance

Zedner contends that the district court erroneously instructed the jury on conscious avoidance. He challenges both the decision to give the instruction and the content of the instruction. We conclude that an appropriate factual basis existed to give the conscious

avoidance charge. Although the precise charge given was not ideal, no objection was made to its specific terms and its deficiencies were not so dire as to constitute plain error.

"A conscious-avoidance charge is appropriate when (a) the element of knowledge is in dispute, and (b) the evidence would permit a rational juror to conclude beyond a reasonable doubt 'that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.'" *United States v. Hopkins*, 53 F.3d 533, 542 (2d Cir. 1995) (quoting *United States v. Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993)). Zedner concedes that the first prong has been met because he denied knowing that the bonds were counterfeit. He contends, however, that the second prong was not met because there was an insufficient factual basis for the jury to conclude that he deliberately chose not to inquire into whether the bonds were genuine.

Zedner relies on two main arguments. First, he points out that, contrary to what one would expect of a person avoiding the truth, he repeatedly took the bonds to different financial institutions in an attempt to determine their authenticity. The argument mischaracterizes the evidence. Zedner took the bonds to financial institutions attempting to use them in a fraudulent transaction. He insisted on the bonds' authenticity and told elaborate lies to cover for the bonds' obvious facial defects. Nor did he disclose his prior unsuccessful attempts to deposit the bonds with other institutions. We cannot say on this record it would have been irrational for a jury to conclude that Zedner avoided the truth about the bonds.

Second, Zedner argues that there was no adequate factual basis for giving a conscious avoidance charge because the jury could have concluded either that (1) Zedner was not delusional at all and therefore had actual knowledge that the bonds were counterfeit, or that (2)

Zedner was delusional and did not make a conscious decision to overlook the suspect nature of the bonds because he genuinely believed they were real. He is correct that jurors could have found he actually knew the bonds were counterfeit, in which case they should have convicted, or that he genuinely believed they were genuine, in which case they should have acquitted him. But the jury could also have reasonably concluded that Zedner was aware of the high probability that the bonds were counterfeit and deliberately avoided confirmation of that fact. A conscious avoidance instruction "is not inappropriate merely because the government has primarily attempted to prove that the defendant had actual knowledge." *Hopkins*, 53 F.3d at 542; *see also United States v. Wong*, 884 F.2d 1537, 1542 (2d Cir. 1989). We conclude that the district court made no error in its decision to instruct the jury on conscious avoidance.

We now turn to the specific language of its instruction. After the district court initially overruled Zedner's objection to giving the conscious avoid charge, the defense proposed changes to the wording of the charge. The district court accepted these changes. The defense renewed its objection to giving the charge after the jury retired, but never raised any specific objections to the content of the modified charge. Accordingly, we review the language used by the district court for plain error. *See United States v. Feroz*, 848 F.2d 359, 360-61 (2d Cir. 1988) (per curiam); *United States v. Lanza*, 790 F.2d 1015, 1021 (2d Cir. 1986).

In the course of its instruction, the district court said, "knowledge that Government's Exhibit 1 was a fictitious instrument may be inferred [from] circumstances that convince an average or other person that . . . this is the fact." Trial Tr. at 417. Zedner argues that allowing the jury to infer knowledge from circumstances that would convince "an average or other person" that the bonds were false invited the jury to convict based on negligence. *See Rodriguez*, 983

F.2d at 458 (suggesting that conscious avoidance cannot be found merely because the circumstances "'should have apprised [the defendant] of the unlawful nature of [his] conduct'" (quoting *United States v. Joyce*, 542 F.2d 158, 161 (2d Cir. 1976)). If this language stood alone, Zedner would have a strong point. However, we review a potentially erroneous instruction in "light of the jury charge as a whole." *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1196 (2d Cir. 1989); *see also Jones v. United States*, 527 U.S. 373, 391 (1999) (citing cases). The problematic instruction quoted above was given in conjunction with other passages, which told the jury, "If the defendant did not knowingly . . . make material misrepresentations you must find the defendant not guilty," and that it could not convict even if the "reason that the defendant lack[ed] such knowledge . . . was careless[ness] and negligen[ce] or even foolish[ness]." Trial Tr. at 417. In addition, the court said that conscious avoidance could not satisfy the knowledge requirement, regardless of what an average person would believe in the situation, if "the facts showed that the defendant actually believed that the instrument was authentic." *Id.* Reviewing the charge as a whole, we conclude that the risk of misunderstanding was substantially diminished. We therefore cannot say any error was "so obvious and seriously prejudicial to [Zedner's] substantial rights" as to warrant relief where Zedner made no objection to the content of the charge. *United States v. Bonito*, 57 F.3d 167, 174 (2d Cir. 1995).

IV. Downward Departures

Zedner alleges that the district court mistakenly believed it lacked the authority to grant a downward departure on the basis of diminished mental capacity or his contention that the loss determination overstated the seriousness of the offense. The government responds that the

district court understood its authority to depart but chose not to exercise that authority as a matter of discretion. The decision whether to depart is committed to the sentencing court's discretion, but we remand for resentencing when we perceive a "substantial risk that the judge misapprehended the scope of his departure authority." *United States v. Silleg*, 311 F.3d 557, 561 (2d Cir. 2002) (internal quotation marks omitted).

The district court's comments at sentencing, although ambiguous, appear on occasion to conflate the standard for diminished mental capacity with the standard for failure to form criminal intent. As a result, the district court seemed to conclude that it could not grant a downward departure for diminished mental capacity in light of the jury verdict finding beyond a reasonable doubt that Zedner intended to defraud the various financial institutions he approached with his counterfeit bonds.

A downward departure for diminished mental capacity "may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense." U.S.S.G. § 5K2.13. A finding of diminished mental capacity does not necessarily mean that a defendant lacked criminal intent. *See United States v. Ventrilla*, 233 F.3d 166, 169 (2d Cir. 2000) (per curiam) ("[The district court's] statement suggests that it thought of diminished capacity as a question of *mens rea* for the jury to decide at trial . . . rather than a question for the court at sentencing. But that is incorrect."). For example, a defendant might fully intend to defraud a business partner, but if the fraud itself was motivated by baseless delusions that the defendant needed the money to ransom a fictitious kidnap victim, a sentencing court might properly find that the defendant was less culpable and grant a downward departure.

If a jury verdict convicting the defendant, and thereby indicating that the defendant formed the requisite criminal intent, precluded such a departure, it would make little sense for § 5K2.13 to appear in the Guidelines, because by the time a judge considers a downward departure for diminished mental capacity, every defendant has necessarily been found, either based on his plea or trial evidence, to have acted with criminal intent. Indeed, an application note added to the Guidelines in 1998 stated, "'Significantly reduced mental capacity' means the defendant, *although convicted*, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful." U.S.S.G. App. C, amend. 583 (codified at U.S.S.G. § 5K2.13, cmt. n.1) (emphasis added). Although this amendment was added after the 1995 version of the Guidelines used in this case, it merely made explicit what was already implicit in the structure of the Guidelines—a conviction does not preclude a downward departure for diminished mental capacity.

In rejecting counsel's argument for departure based on diminished mental capacity, the court said,

> You argued, I thought very successfully, to the jury, that he was suffering, if I can use that word, from a delusional complex. I think the jury might have bought it up until the last two witnesses of the people who he attempted to defraud by his machinations, and [at that] point, whatever delusional defense you had went out the window, and I'm not going to interfere with that determination by the jurors.

We cannot discern exactly what the court meant by this statement. It seems to suggest that the court believed the jury's rejection of the defendant's contention that he acted without intent to defraud precluded the court from finding diminished mental capacity that would justify

a departure. If so, that was incorrect. The defendant could have acted with criminal intent so as to be guilty of the crime, while at the same time suffering from a diminished mental capacity that would justify departure. Such a departure would in no way "interfere with" the jury's finding of guilt.

In two other respects the court may have misunderstood its sentencing discretion. Zedner's counsel argued that the loss calculation under U.S.S.G. § 2F1.1(b)(1) overstated the seriousness of his offense because the bonds were so obviously invalid that they were unlikely to fool any financial institution. The court responded that it "never saw anything in the sentencing guidelines" to support that contention. In fact, Comment 10 to the pertinent guideline expressly authorizes the argument Ms. Gaffey was making. It states, "In a few instances, the loss determined under subsection (b)(1) may overstate the seriousness of the offense. This may occur, for example, where a defendant attempted to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it. In such cases, a downward departure may be warranted." U.S.S.G. § 2F1.1, cmt. n.10 (1995).

The court also rebuffed Ms. Gaffey's argument based on the obviously phony nature of the bonds by saying, "You argued that to the jury. They didn't buy it." That remark seems to indicate that the court believed it could not depart downward based on the obviously phony nature of the bonds because the jury had rejected Zedner's argument that he lacked a criminal state of mind on account of his delusional belief that the bonds were genuine. There is no incompatibility between a jury's finding that the defendant did not delusionally believe phony bonds were genuine and a court's conclusion that the severity of the offense was diminished by the obviously spurious nature of the bonds. *Cf. United States v. Agwu*, 5 F.3d 614, 616 (2d Cir.

1993) (per curiam) (noting that a decision not to depart pursuant to Comment 10 "is not appealable unless the refusal was based on the court's mistaken belief that it did not have the discretion to do so").

The combination of circumstances resulting from the risk that the court misconstrued its authority to depart downward and the upheaval in the federal sentencing laws resulting from the Supreme Court's decision in *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005), convinces us that the best course is to remand for resentencing consistent with this opinion and in accordance with the dictates of *Booker*.

CONCLUSION

We have considered Zedner's remaining claims and find them to be without merit. For the foregoing reasons, we **AFFIRM** the judgment of conviction, but **VACATE** the sentence and **REMAND** for resentencing.

AO 245B (8/96 Rev. locally 9/97)- Judgment in a Criminal Case

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK
CENTRAL ISLIP DIVISION

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: CR-96-285

vs.

JACOB ZEDNER

Defendant's Attorney: Tracey Gaffey

THE DEFENDANT:

☐ pleaded guilty to count(s)
☐ pleaded nolo contendere to count(s) which was accepted by the court.
☒ was found guilty on count(s) ONE, TWO, FOUR, FIVE, SIX, and SEVEN after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of the following count(s), involving the indicated offense(s):

TITLE & SECTION	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT NUMBER(S)
18 USC 1344	BANK FRAUD, a Class B Felony		1, 2, 4-7

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and the Mandatory Victims Restitution Act of 1996.

☐ The defendant has been found not guilty on count(s)
☒ Count(s) THREE and EIGHT were dismissed on the motion of the United States at the beginning of trial.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Social Security Number: 122-78-0006

Date of Imposition of Sentence: 1/22/2004

Defendant's Date of Birth: August 7, 1954

Defendant's USM No.: 46534-053

THOMAS C. PLATT
UNITED STATES DISTRICT JUDGE

DATE: January 23, 2004

Defendant's Residence Address: In custody
72 Hicks Lane
Great Neck, NY

Defendant's Mailing Address: —

A TRUE COPY
ATTEST
DATED 1/26/2004
ROBERT C. HEINEMANN
CLERK
BY
DEPUTY CLERK

Defendant: JACOB ZEDNER
Case No.: CR-96-285

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of SIXTY-THREE (63) MONTHS, on each count to run concurrent. The defendant is given credit for time served and for time in the custody of the Bureau of Prisons for psychiatric evaluations.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ **The defendant is remanded to the custody of the United States Marshal.**
☐ The defendant shall surrender to the United States Marshal for this district.

- ☐ at __ a.m./p.m. on __.
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

- ☐ before 2 p.m. on ___. If the defendant is not designated within the given time frame he/she should surrender to the Marshals office in Brooklyn. If the defendant has not already done so at the time of sentence he/she should communicate with the Marshals office to obtain information regarding the procedures for voluntary surrender.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By: _____
Deputy Marshal

Defendant: JACOB ZEDNER
Case No.: CR-96-285

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime, and shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C § 921.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

The defendant shall comply with the following standard conditions that have been adopted by this court.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instruction of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14) if this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

Defendant: JACOB ZEDNER
Case No.: CR-96-285

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B. The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

	Assessment	Fine	Total Restitution
Totals:	$300.00	$	$

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $.

☐ The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

☐ The interest requirement is waived.
☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until ___. An Amended Judgment in a Criminal Case will be entered after such a determination. The U.S. Attorneys Office is directed to provide the necessary information to the court.

☐ The defendant shall make restitution to the following victims in the amounts listed below:

☐ Restitution is ordered jointly and severally with:

or

Name of Payee	Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$___	$___	

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column above.

The amount of loss and the amount of restitution ordered will be the same unless, pursuant to 18 U.S.C. §3664(f)(3)(B), the court orders nominal payments and this is reflected on Sheet 6, Statement of Reasons.

Defendant: JACOB ZEDNER
Case No.: CR-96-285

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except: (see attachment, if necessary):

GUIDELINE RANGE DETERMINED BY THE COURT:

Total Offense Level: 25

Criminal History Category: II

Imprisonment Range: 63 to 78 months

Supervised Release Range: 3 to 5 years

Fine Range: $ 10,000 to $1,000,000

☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $

☐ The court finds pursuant to 18 U.S.C.§ 3664(f)(3)(B) that the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments and is therefore ordering only nominal payments be made.

☐ Restitution is not ordered because:

☐ the defendant was convicted of a qualifying offense under 18 U.S.C. § 3663(a)(1)(A) and the court has considered the factors enumerated in 18 U.S.C. § 3663(a)(1)(B)(i), determining an order of restitution not to be appropriate.

☐ the defendant was convicted of qualifying offense under 18 U.S.C. § 3663(a)(1)(A) and court has considered the factors enumerated in 18 U.S.C. § 3663(a)(1)(B)(i); pursuant to 18 U.S.C. § 3663(a)(1)(B)(ii), it has been determined that the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims.

☐ the defendant was convicted of a qualifying offense under 18 U.S.C. § 3663A (c)(1)(A)(ii) and, pursuant to 18 U.S.C. § 3663A(c)(3)(A), the court finds from facts on the record that the number of identifiable victims is so large as to make restitution impracticable.

☐ the defendant was convicted of a qualifying offense under 18 U.S.C. § 3663A (c)(1)(A)(ii) and, pursuant to 18 U.S.C. § 3663A(c)(3)(B), the court finds from facts on the record that determining complex issues of fact related to the cause or amount of the victims losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the follow reason(s):

OR

The sentence departs from the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following reason(s):

35

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

Plaintiff,

- against -

JACOB ZEDNER,

Defendant.

----------X

MEMORANDUM AND ORDER

96-CR-285 (TCP)

PLATT, District Judge.

Defendant's attorney, Tracey Gaffey of the Federal Defender's Office, has made a Motion to Dismiss the indictment against the defendant for failure of the Court and the Government to give the defendant a speedy trial pursuant to 18 U.S.C. § 3161, completely ignoring or otherwise overlooking the fact that early on in this complex (both medical and multiple witness) litigation, defendant with the advice and assistance of counsel, under oath, waived all of his rights in open court and in a signed writing to a speedy trial for all time (copy of waiver annexed hereto).

Defense counsel will almost certainly argue that speedy trial rights may not, under the Act, be waived, but again she completely ignores or otherwise overlooks the fact that under the Act a defendant may waive his rights to speedy

trial by inaction (i.e. by not raising the right prior to the commencement of a trial) 18 U.S.C. § 3162(a)(2), and, hence, most certainly may waive such rights by affirmative action as he has done voluntarily and under oath, with the advice of counsel, here.

Moreover, defendant, of course, made no such motion on the morning of the date on which the case was called to commence the trial on the merits and may be said to have waive by inaction at that point. 18 U.S.C. § 3162(a)(2). Prior to that date, the defendant, himself, had issued and served some 33 subpoenas on witnesses to appear for the trial on that date. Among the more illustrious of these witnesses were:

U.S. President William Jefferson Clinton
U.S. Attorney General Janet Reno
U.S. Secretary of State Madeline Albright
U.S. Senator Alphonse D'Amato
Chiang Kai-shek
U.S. Treasury Secretary Robert Rubin
U.S. Federal Reserve Chairman Alan Greenspan
National Security Advisory to the White House Andy Burger

In light of the facts then known to it, instead of selecting a jury from a panel waiting in the courthouse for that purpose, the Court, with the consent and in the presence of present counsel, conducted a competency hearing.

Among other things, the Court was aware of the fact that (i) defendant had been arrested on March 12, 1996, (ii) an indictment had been

returned and filed on April 4, 1996, charging defendant with seven counts in a scheme to defraud financial institutions and one count of knowingly possessing counterfeit bonds, (iii) defendant was maintaining that he had no knowledge of the counterfeit nature of the financial instruments in question from the date of his receipt thereof in March 1996 to October 1998 and (iv) that even when advised by a representative of the U.S. Treasury Department that they were counterfeit he accepted such advice "with reservations."

At the competency hearing, defendant identified two of the counterfeit bonds that were tendered to those institutions named in the first seven counts of the indictment. Each of these bonds were in the face amount of ten million dollars. Defendant testified that he received those bonds approximately a week before his arrest via courier from two individuals named "Eagle Chang" and "Tommy Chin" who were located in Taiwan and with whom he had spoken on the telephone, but had never met. According to the defendant, the bonds arrived in connection with an anticipated transfer by these individuals of three million dollars and a power of attorney to defendant pursuant to arrangements, that were never fully explained.

In earlier statements to Government agents, defendant said that the bonds, which showed a date of issue of 1935, were given to Chiang Kai-shek when he fled to Taiwan during the Communist takeover of mainland China

(which occurred in 1949) The bonds purportedly issued by "Ministry of Finance of the USA" contained a number of obvious deficiencies on their face such as "Onited Staes," identical serial numbers and a stated duration of "forevev." One of defendant's several explanations for the misspellings was that they represented a "secret code" used to establish the bond's legitimacy.

Attached to a number of the subpoenas and exhibits given to the Court at the hearing and on prior occasions were copies of the counterfeit notes, bonds and other instruments that defendant repeatedly claimed were authentic, but which bore such inscriptions as (i) "United States of America - THREE HUNDRED MILLION DOLLARS - [drawn on] Huau Bank 1933"; (ii) "The Ministry of Finance of USA entrusts the Washington Bank of America with responsibility for the issue of US Dollra (sic) Bond to all over the world (sic) since 1935"; and a Federal Reserve Note describing itself as (iii) "Hua Qi Bank Certificate Note [on which] [y]ou can draw one hundred million U.S. dollars from Hua Qi Bankor (sic) the branches In.ine (sic) from Augit 6th October 1949 (sic) . . . [signed] Dhtladelphla Cgicago (sic) Illinois St. Louis Missour (sic) and Thunted States of America Clevesand, Ohio. Auouit (sic) 10, 1949."

It is incomprehensible to this Court how defendant rationally might maintain lack of knowledge as to the counterfeit nature of these instruments for over two years following his arrest by government agents, his indictment by a

grand jury, the inscriptions on the instruments, and repeated statements to the contrary by government agents and other institutions.

Attached hereto and made a part hereof is a copy of the Court's written Memorandum and Order dated October 19th summarizing what happened at the competency hearing.

Defendant appealed and the Second Circuit reversed, accepting a misleading misrepresentation by another member of the Federal Defender's Office, stating that the Court had held a competency hearing and erred by allowing defendant to proceed pro se at the competency hearing without ever having determined defendant's competency to make a knowing and intelligent waiver of the right to representation by counsel. The fact is, however, that defendant was represented by counsel who immediately, prior to the hearing, advised the Court that defendant proposed to conduct the entire trial by himself (opening, cross examination, direct and summation) without the assistance of counsel. At that point, the Court insisted that the defendant must have counsel (if only in an advisory capacity) throughout the proceedings and the trial. The Court of Appeals said Ms. Tracey Gaffey did not ask or object to a single question. That is true, but she did not do so because she was obviously told by her client not to do so

Ms. Tracy Gaffey is a highly competent counsel. The defendant had repeatedly said in prior proceedings he did not want Ms. Gaffey or any other lawyer to represent him; indeed, he did not want her to be in court with him. Only by reason of this Court's insistence was she permitted to remain and to represent him as she did.

Among defendants parting words to the Court after the hearing were an admonition to the Court that defendant wanted all of the subpoena recipients, including the "illustrious ones" named above, to appear for his trial.

Nonetheless, following the Second Circuit's Opinion on October 1, 1999, the Court held a second competency hearing on July 10, 2000, at which Ms. Gaffey called Sanford L. Drob, (not a psychiatrist but) the director of psychological assessment at Bellevue Hospital and the senior psychologist at the Bellevue prison ward. Dr. Drob testified that while his tests did not indicate the presence of a mental illness or the presence of a severe psychiatric disturbance, they were "suggestive of a serious psychological disorder," that he believed that he suffered from a "delusional disorder," and that there were two types of delusions, bizarre delusions and non-bizarre delusions.

On cross examination Dr. Drob conceded that it was not necessary for him to communicate with Alan Greenspan to determine whether or not Mr. Zedner was (as he claimed to be) part of an organization that ran the Federal

Reserve Board; that it was not necessary for him to conduct an independent investigation to determine whether Mr. Zedner (as he claimed) controlled fifty million dollars in bonds; that he (Dr. Drob) had never theretofore heard or read about a person who fancied himself as the head of the Federal Reserve System; that in his mind there was no possibility whatsoever that the bonds that Mr. Zedner was talking about were legitimate and that he (Dr. Drob) was not "terribly optimistic" that Mr. Zedner could be treated for his delusions but there was a possibility that he could be helped.

The law apparently still is that a "District Court's finding will be upheld unless clearly erroneous" and "where there are two permissible views of the evidence as to competency, the Court's choice between them cannot [sic] be deemed fairly erroneous." *United States v. Nichols*, 56 F.3d 403, 410 (2d Cir. 1995).

This Court, of course, is neither a psychiatrist nor a psychologist, but good old fashioned "common sense" tells this Court that it is not normal.

1. To receive via courier from two individuals named Earl Chang and Tommy Chin located in Taiwan with whom one had spoken but had never met, bonds with a face amount of Ten million dollars to be followed by Three trillion dollars worth of bonds and a power of attorney.

2. That legitimate bonds would show that a date of issue of 1935 which were issued by the "Ministry of Finance of USA" and contained obvious deficiencies on their face such as "Onited Staes," identical serial numbers with a stated duration of "forevev."

3. That the obvious misspellings were a "secret code" "used to establish the bonds' legitimacy."

4. A normal person carried an identification card which said "United Nations, New York affiliate 06 December 1997, Number 1010233."

5. This "was an international security matter."

6. The individual was doing the United States a favor as "his job was to bring the money to the United States for investment."

7. That he used the name of John Davidson because it was "related to his sensitive work and when you're dealing with the Russians and Chinese its very sensitive work."

8. That the notes, bonds and other instruments claimed to be au hentic bore inscriptions as (a) United States of America - THREE HUNDRED MILLION DOLLARS - [drawn on] Huau Qi Bank 1933, (b) "The Ministry of Finance of USA entrusts the Washington Bank of America with responsibility fo the issue of US Dollra (sic) Bond to all over the world (sic) since 1935," and (c) a federal reserve note describing itself as "Hua Qi Bank Certificate Note [on which] [y]ou can draw one million U.S.

dollars from Hua Qi Bankor (sic) the branches In.ine (sic) from Augit 6th October 1949 (sic) . . . 9signed] Dhtladelphla Cgicago (sic) Illinois St. Louis Missour (sic) and Thunted States of America Clevesand, Ohio. Auouit (sic) 10, 1949.

9. He needed the testimony of President Clinton, Attorney General Reno, Secretary of State Allbright, Senator D'Amato, Chiang Kai-shek, Treasury Secretary Rubin, Federal Reserve Chairman Greenspan and National Security Advisor Burger to explain to a court and jury the secret code and authenticity of the bonds, notes and other instruments.

Good old fashion common sense also tells the undersigned (if no one else) that such thinking is not only delusional, but patently and blatantly bizarre and that one who holds such beliefs must be suffering from a mental disease or defect which renders him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

Under 18 U.S.C. § 4241(e), the law requires this Court to commit the defendant for such a reasonable time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed.

Accordingly, defendant's motion to dismiss must be and hereby is denied and defendant must appear on March 30, 2001 at 9:30 a.m. for sentencing

in accordance with this Memorandum and Order.

SO ORDERED.

District Judge, United States District Court

Dated: Central Islip, New York
March 21, 2001

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[redacted]

NOV 0 0 1996 JACOB ZEDNER, being duly sworn, depose and say that

P.M. 11 8 1996 A.M.

1. I have been advised and fully understand I am entitled to a speedy trial under the Sixth Amendment to the United States Constitution, the Speedy Trial Act of 1974 (18 U.S.C. § 3161 et seq.), the Rules of this Circuit, and the Speedy Trial Plan adopted by this Court.

2. I have been advised and fully understand that this Court is prepared to give me a speedy trial in compliance with the foregoing authorities and commence such trial on January 17, 1996.

3. My counsel and I have requested that I not be given a speedy trial and have stated and represented that I wish to waive my rights to a speedy trial under the Sixth Amendment to the Constitution, under the Speedy Trial Act of 1974 (18 U.S.C. § 3161 et seq.), under the Rules of this Circuit and under the Speedy Trial Plan adopted by this Court.

4. I have been advised and fully understand that if I do so waive my rights to a speedy trial, I also waive any and all rights to make a motion to dismiss the indictment (information) against me for failure of the Court to give me a speedy trial and that I waive all of such rights to a speedy trial and to make such a motion or motions for all time.

5. No promises or threats of any kind have been made to me to induce me to waive my rights to a speedy trial and my rights to move to dismiss.

6. I have not been threatened or coerced by anyone into making such waivers.

7. I am making such waivers voluntarily and of my own free will because I wish to do so and for no other reason.

8. I have discussed my waivers fully with my attorney.

9. I am 42 years of age and I have completed 12 years of school, 2 years of college and 0 years of post graduate work.

A 46

10. I have been advised of and fully understand my rights to a speedy trial and my rights to make a motion to dismiss in the event I am not accorded

authorities and commence such trial on November 12, 1996.

3. My counsel and I have requested that I not be given a speedy trial and have stated and represented that I wish to waive my rights to a speedy trial under the Sixth Amendment to the Constitution, under the Speedy Trial Act of 1974 (18 U.S.C. § 3161 et seq.), under the Rules of this Circuit and under the Speedy Trial Plan adopted by this Court.

4. I have been advised and fully understand that if I do so waive my rights to a speedy trial, I also waive any and all rights to make a motion to dismiss the indictment (information) against me for failure of the Court to give me a speedy trial and that I waive all of such rights to a speedy trial and to make such a motion or motions for all time.

5. No promises or threats of any kind have been made to me to induce me to waive my rights to a speedy trial and my rights to move to dismiss.

6. I have not been threatened or coerced by anyone into making such waivers.

7. I am making such waivers voluntarily and of my own free will because I wish to do so and for no other reason.

8. I have discussed my waivers fully with my attorney.

9. I am 42 years of age and I have completed 12 years of school, 2 years of college and 0 years of post graduate work.

10. I have been advised of and fully understand my rights to a speedy trial and my rights to make a motion to dismiss in the event I am not accorded a speedy trial and I hereby waive all such rights and so waive them for all time.

Defendant

Witnessed and approved:

Attorney for Defendant

Subscribed and sworn to before me this 8th day of November, 1996.

BEFORE: PLATT, J.

AT 9:30 am

CRIMINAL CAUSE
STATUS CONFERENCE

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
LONG ISLAND OFFICE
NOV 0 0 1996
TIME P.M. 11/8/96
TIME A.M.

CR-96-285 USA -v- JACOB ZEDNER

APPEARANCES: For GOVT.: AUSA-Leonard Lato
(516)228-3167

FOR DEFT. REYNOLDS CARONIA & GIANELLI
BY-James Hagney
(516)231-1199
200 Motor Parkway
PO Box 11177
Hauppauge, NY 11788
(appted under CJA)

Case called. A + counsel for both sides present. Conf. held Waiver of speedy trial for all time signed, to be filed. Order of excludable delay also signed, to be filed.
Case adj'd to 1/31/97 @ 9:30 AM for reas. placed on record

Code T, III, IV + X
11/8/96
1/31/97

A - 48

vs.

CASE NUMBER CR-96-283

NOV 0 1996

CASE NUMBER M _____

Jacob Yedner

TIME P.M. x 11/8/96 (M)
TIME A.M.

It is hereby stipulated that the time periods from 11/8/96

_____ until ( ) revocation of this stipulation/( ) 1/31/97

are excluded periods of delay under the following code(s):

SECTION 3161	DELAY CODE	DELAY CATEGORY
) (h)(1)(A)	A	Exam or hearing for mental or physical incapacity (18 U.S.C. 4244)
) (h)(1)(B)	B	NARA Exam (28 U.S.C. 2902)
) (h)(1)(D)	C	State or Federal trials or other charges
) (h)(1)(E)	D	Interlocutory appeals
) (h)(1)(F)	E	Pretrial Motions (from filing or being orally made to hearing or other prompt disposition)
) (h)(1)(G)	F	Transfers from other districts (Pursuant to F.R.Cr.P. 20, 21 & 40)
) (h)(1)(J)	G	Proceeding under advisement not to exceed 30 days
)	H	Miscellaneous proceedings: Parole or probat revocation, deportation, extradition
) (h)(1)(C)	5	Deferral of prosecution under 28 U.S.C. 290
) (h)(1)(H)	6	Transportation from another district or to/ from examination or hospitalization in ten days or less

) (h)(4) — N — Period of mental or physical incapacity of defendant to stand trial

) (h)(5) — O — Period of NARA commitment or treatment

) (h)(6) — P — Superseding indictment and/or new charges

) (h)(7) — R — Defendant awaiting trial of co-defendant when no severance has been granted

) (h)(8)(A)(B) — T — Continuances granted per (h)(8) as determined by the Court due to:

) I. Emergencies such as:
( ) a. natural disasters;
( ) b. blackouts;
( ) c. public transportation or other strikes which substantially affect the Court's ability to operate or the ability of the party to prepare for or proceed to
( ) d. illness or death of defense counsel, the prosecutor or the judge as well as mourning periods observed by the parties, counsel, or the Court.

) II. The cooperation of the defendant
(If this order is to be sealed due to the cooperation of the defendant, check appropriate area at the end of this order).

) III. The Government attorney or defense counsel has demonstrated due diligence in all available time, but nevertheless still require additional time for preparation prevent a miscarriage of justice such as:

( ) a. the attempt to locate an important witness whom defense counsel has not bee to locate;
( ) b. belated discovery motions or notice of alibi defense which require addition to investigate or expert analysis.

IV The assurance that both the defendant and the Governmentbe represented by couns choice and by the same attorney throughout the proceedings, such as:
( ) a. Counsel for the Government and/or the defendant are unavailable for either chosen by the Court, or the last date on which trial could commence under
( ) b. inadequate time to prepare for this trial following the conclusion of coun last trial;
( ) c. a brief vacation planned well in advance of the trial date.

[redacted] ( ) b. [redacted] co-defendants either

) VI. The Court orders the severance of the trial of one or more co-defendants either before trial commences or during trial.

) VII. Excusable error or neglect such as:
( ) a. miscalculation in the excludable time available;
( ) b. the failure of a clerk to file a dismissal of the complaint although direct by the Government to do so;
( ) c. the determination that a period of time previously held automatically exclu ed was incorrect.

) VIII. The case may be disposed of after other proceedings are concluded such as:
( ) a. pending Supreme Court case determinative of outcome;
( ) b. where appellate affirmance of another proceeding involving the defendant will result in the Government's dismissal of this case.

) IX. Time during the arrest-indictment or information interval by events beyond the control of the Court or the Government attorney, such as:
( ) a. the Government's desire to pursue leads furnished by the defense;
( ) b. a reasonable time needed for the completion of laboratory examination;
( ) c. emergencies such as the sickness of the Government attorney;
( ) d. cooperaton of the defendant;
( ) e. a reasonable period of time (not to exceed 60 days) beginning with the defendant's request to be considered for deferred prosecution;
( ) f. the time needed so that the Government attorney can comply with the Grand Jury Guidelines promulgated by the Department of Justice.

ECTION 3161	DELAY CODE	DELAY CATEGORY
	U	Time up to withdrawal of guilty plea
) (i)	W	Grand jury indictment time extended 30 more days
) (b)	X	(Other) Defense counsel seeks add'l time to review case & Govt concurs. Waiver of Speedy Trial for all time also signed

) This record of excludable delay is to be recorded upon the docket sheet by code only, and the order placed under seal by the Clerk of the Court.

The non-trial period of time pursuant to Title 18 U.S.C. 3161(c)(2) shall have commence on _____ (date of the first appearance through counsel or waiver of counsel).

BEST AVAILABLE COPY

Speedy Trial Act of 1974, 18 U.S.C. §§ 3161 - 3174 (West 2005)

CHAPTER 208—SPEEDY TRIAL

Sec.

3161. Time limits and exclusions.
3162. Sanctions.
3163. Effective dates.
3164. Persons detained or designated as being of high risk.
3165. District plans—generally.
3166. District plans—contents.
3167. Reports to Congress.
3168. Planning process.
3169. Federal Judicial Center.
3170. Speedy trial data.
3171. Planning appropriations.
3172. Definitions.
3173. Sixth amendment rights.
3174. Judicial emergency and implementation.

§ 3161. Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day

period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;

(D) delay resulting from trial with respect to other charges against the defendant;

(E) delay resulting from any interlocutory appeal;

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent

preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(9) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly—

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

(k)(1) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs more than 21 days after the day set for trial, the defendant shall be deemed to have first appeared before a judicial officer of the court in which the information or indictment is pending within the meaning of subsection (c) on the date of the defendant's subsequent appearance before the court.

(2) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs not more than 21 days after the day set for trial, the time limit required by subsection (c), as extended by subsection (h), shall be further extended by 21 days.

(Added Pub.L. 93–619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2076, and amended Pub.L. 96–43, §§ 2–5, Aug. 2, 1979, 93 Stat. 327, 328; Pub.L. 98–473, Title II, § 1219, Oct. 12, 1984, 98 Stat. 2167; Pub.L. 100–690, Title VI, § 6476, Nov. 18, 1988, 102 Stat. 4380; Pub.L. 101–650, Title III, § 321, Dec. 1, 1990, 104 Stat. 5117.)

HISTORICAL AND STATUTORY NOTES

References in Text

Section 2902 of Title 28, referred to in subsec. (h)(1)(B), (C), (5), was repealed by Pub.L. 106–310, Div. B, Title XXIV, § 3405(c)(1), Oct. 17, 2000, 114 Stat. 1221.

Change of Name

Words "magistrate judge" substituted for "magistrate" in subsec. (c)(1) pursuant to section 321 of Pub.L. 101–650, set out as a note under 28 U.S.C.A. § 631.

Short Title

1979 Amendments. Section 1 of Pub.L. 96–43 provided: "That this Act [amending this section and sections 3163 to 3168, 3170 and 3174 of this title] may be cited as the 'Speedy Trial Act Amendments Act of 1979'."

1974 Acts. Section 1 of Pub.L. 93–619 provided: "That this Act [enacting this chapter and sections 3153 to 3156 of this title, and amending section 3152 of this title, and section 604 of Title 28, Judiciary and Judicial Procedure] may be cited as the 'Speedy Trial Act of 1974'."

§ 3162. Sanctions

(a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such

motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

(b) In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;

(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;

(C) by imposing on any attorney for the Government a fine of not to exceed $250;

(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

(c) The court shall follow procedures established in the Federal Rules of Criminal Procedure in punishing any counsel or attorney for the Government pursuant to this section.

(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2079.)

§ 3163. Effective dates

(a) The time limitation in section 3161(b) of this chapter—

(1) shall apply to all individuals who are arrested or served with a summons on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

(2) shall commence to run on such date of expiration to all individuals who are arrested or served with a summons prior to the date of expiration of such twelve-calendar-month period, in connection with the commission of an offense, and with respect to which offense no information or indictment has been filed prior to such date of expiration.

(b) The time limitation in section 3161(c) of this chapter—

(1) shall apply to all offenses charged in informations or indictments filed on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

(2) shall commence to run on such date of expiration as to all offenses charged in informations or indictments filed prior to that date.

(c) Subject to the provisions of section 3174(c), section 3162 of this chapter shall become effective and apply to all cases commenced by arrest or summons, and all informations or indictments filed, on or after July 1, 1980.

(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2080, and amended Pub.L. 96-43, § 6, Aug. 2, 1979, 93 Stat. 328.)

§ 3164. Persons detained or designated as being of high risk

(a) The trial or other disposition of cases involving—

(1) a detained person who is being held in detention solely because he is awaiting trial, and

(2) a released person who is awaiting trial and has been designated by the attorney for the Government as being of high risk,

shall be accorded priority.

(b) The trial of any person described in subsection (a)(1) or (a)(2) of this section shall commence not later than ninety days following the beginning of such continuous detention or designation of high risk by the attorney for the Government. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitation specified in this section.

(c) Failure to commence trial of a detainee as specified in subsection (b), through no fault of the accused or his counsel, or failure to commence trial of a designated releasee as specified in subsection (b), through no fault of the attorney for the Government,

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shall result in the automatic review by the court of the conditions of release. No detainee, as defined in subsection (a), shall be held in custody pending trial after the expiration of such ninety-day period required for the commencement of his trial. A designated releasee, as defined in subsection (a), who is found by the court to have intentionally delayed the trial of his case shall be subject to an order of the court modifying his nonfinancial conditions of release under this title to insure that he shall appear at trial as required.

(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2081, and amended Pub.L. 96-43, § 7, Aug. 2, 1979, 93 Stat. 329.)

§ 3165. District plans—generally

(a) Each district court shall conduct a continuing study of the administration of criminal justice in the district court and before United States magistrate judges of the district and shall prepare plans for the disposition of criminal cases in accordance with this chapter. Each such plan shall be formulated after consultation with, and after considering the recommendations of, the Federal Judicial Center and the planning group established for that district pursuant to section 3168. The plans shall be prepared in accordance with the schedule set forth in subsection (e) of this section.

(b) The planning and implementation process shall seek to accelerate the disposition of criminal cases in the district consistent with the time standards of this chapter and the objectives of effective law enforcement, fairness to accused persons, efficient judicial administration, and increased knowledge concerning the proper functioning of the criminal law. The process shall seek to avoid underenforcement, overenforcement and discriminatory enforcement of the law, prejudice to the prompt disposition of civil litigation, and undue pressure as well as undue delay in the trial of criminal cases.

(c) The plans prepared by each district court shall be submitted for approval to a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district court whose plan is being reviewed or such other active judge of that court as the chief judge of that district court may designate. If approved by the reviewing panel, the plan shall be forwarded to the Administrative Office of the United States Courts, which office shall report annually on the operation of such plans to the Judicial Conference of the United States.

(d) The district court may modify the plan at any time with the approval of the reviewing panel. It shall modify the plan when directed to do so by the reviewing panel or the Judicial Conference of the United States. Modifications shall be reported to the Administrative Office of the United States Courts.

(e)(1) Prior to the expiration of the twelve-calendar-month period following July 1, 1975, each United States district court shall prepare and submit a plan in accordance with subsections (a) through (d) above to govern the trial or other disposition of offenses within the jurisdiction of such court during the second and third twelve-calendar-month periods following the effective date of subsection 3161(b) and subsection 3161(c).

(2) Prior to the expiration of the thirty-six calendar month period following July 1, 1975, each United States district court shall prepare and submit a plan in accordance with subsections (a) through (d) above to govern the trial or other disposition of offenses within the jurisdiction of such court during the fourth and fifth twelve-calendar-month periods following the effective date of subsection 3161(b) and subsection 3161(c).

(3) Not later than June 30, 1980, each United States district court with respect to which implementation has not been ordered under section 3174(c) shall prepare and submit a plan in accordance with subsections (a) through (d) to govern the trial or other disposition of offenses within the jurisdiction of such court during the sixth and subsequent twelve-calendar-month periods following the effective date of subsection 3161(b) and subsection 3161(c) in effect prior to the date of enactment of this paragraph.

(f) Plans adopted pursuant to this section shall, upon adoption, and recommendations of the district planning group shall, upon completion, become public documents.

(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2081, and amended Pub.L. 96-43, § 8, Aug. 2, 1979, 93 Stat. 329; Pub.L. 101-647, Title XXXV, § 3577, Nov. 29, 1990, 104 Stat. 4929; Pub.L. 101-650, Title III, § 321, Dec. 1, 1990, 104 Stat. 5117.)

HISTORICAL AND STATUTORY NOTES

References in Text

For the effective date of subsection 3161(b) and subsection 3161(c) referred to in subsec. (e)(3), see section 3163(a) and (b) of this title. The date of enactment of par. (3) of subsec. (e) of this section is the date of enactment of Pub.L. 96-43, which was approved Aug. 2, 1979. Subsecs. (a) and (b) of section 3163 of this title were not amended by Pub.L. 96-43.

Change of Name

"United States magistrate judges" substituted for "United States magistrates" in subsec. (a) pursuant to section 321 of Pub.L. 101-650, set out as a note under 28 U.S.C.A. § 631.

§ 3166. District plans—contents

(a) Each plan shall include a description of the time limits, procedural techniques, innovations, systems and other methods, including the development of reliable methods for gathering and monitoring information and statistics, by which the district court, the

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United States attorney, the Federal public defender, if any, and private attorneys experienced in the defense of criminal cases, have expedited or intend to expedite the trial or other disposition of criminal cases, consistent with the time limits and other objectives of this chapter.

(b) Each plan shall include information concerning the implementation of the time limits and other objectives of this chapter, including:

(1) the incidence of and reasons for, requests or allowances of extensions of time beyond statutory or district standards;

(2) the incidence of, and reasons for, periods of delay under section 3161(h) of this title;

(3) the incidence of, and reasons for, the invocation of sanctions for noncompliance with time standards, or the failure to invoke such sanctions, and the nature of the sanction, if any invoked for noncompliance;

(4) the new timetable set, or requested to be set, for an extension;

(5) the effect on criminal justice administration of the prevailing time limits and sanctions, including the effects on the prosecution, the defense, the courts, the correctional process, costs, transfers and appeals;

(6) the incidence and length of, reasons for, and remedies for detention prior to trial, and information required by the provisions of the Federal Rules of Criminal Procedure relating to the supervision of detention pending trial;

(7) the identity of cases which, because of their special characteristics, deserve separate or different time limits as a matter of statutory classifications;

(8) the incidence of, and reasons for each thirty-day extension under section 3161(b) with respect to an indictment in that district; and

(9) the impact of compliance with the time limits of subsections (b) and (c) of section 3161 upon the civil case calendar in the district.

(c) Each district plan required by section 3165 shall include information and statistics concerning the administration of criminal justice within the district, including, but not limited to:

(1) the time span between arrest and indictment, indictment and trial, and conviction and sentencing;

(2) the number of matters presented to the United States Attorney for prosecution, and the numbers of such matters prosecuted and not prosecuted;

(3) the number of matters transferred to other districts or to States for prosecution;

(4) the number of cases disposed of by trial and by plea;

(5) the rates of nolle prosequi, dismissal, acquittal, conviction, diversion, or other disposition;

(6) the extent of preadjudication detention and release, by numbers of defendants and days in custody or at liberty prior to disposition; and

(7)(A) the number of new civil cases filed in the twelve-calendar-month period preceding the submission of the plan;

(B) the number of civil cases pending at the close of such period; and

(C) the increase or decrease in the number of civil cases pending at the close of such period, compared to the number pending at the close of the previous twelve-calendar-month period, and the length of time each such case has been pending.

(d) Each plan shall further specify the rule changes, statutory amendments, and appropriations needed to effectuate further improvements in the administration of justice in the district which cannot be accomplished without such amendments or funds.

(e) Each plan shall include recommendations to the Administrative Office of the United States Courts for reporting forms, procedures, and time requirements. The Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, shall prescribe such forms and procedures and time requirements consistent with section 3170 after consideration of the recommendations contained in the district plan and the need to reflect both unique local conditions and uniform national reporting standards.

(f) Each plan may be accompanied by guidelines promulgated by the judicial council of the circuit for use by all district courts within that circuit to implement and secure compliance with this chapter.

(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2082, and amended Pub.L. 96-43, § 9(a)-(c), Aug. 2, 1979, 93 Stat. 329; Pub.L. 101-647, Title XXXV, § 3578, Nov. 29, 1990, 104 Stat. 4929.)

§ 3167. Reports to Congress

(a) The Administrative Office of the United States Courts, with the approval of the Judicial Conference, shall submit periodic reports to Congress detailing the plans submitted pursuant to section 3165. The reports shall be submitted within three months following the final dates for the submission of plans under section 3165(e) of this title.

(b) Such reports shall include recommendations for legislative changes or additional appropriations to achieve the time limits and objectives of this chapter. The report shall also contain pertinent information such as the state of the criminal docket at the time of the adoption of the plan; the extent of pretrial detention and release; and a description of the time limits, procedural techniques, innovations, systems, and other

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methods by which the trial or other disposition of criminal cases have been expedited or may be expedited in the districts. Such reports shall also include the following:

(1) The reasons why, in those cases not in compliance with the time limits of subsections (b) and (c) of section 3161, the provisions of section 3161(h) have not been adequate to accommodate reasonable periods of delay.

(2) The category of offenses, the number of defendants, and the number of counts involved in those cases which are not meeting the time limits specified in subsections (b) and (c) of section 3161.

(3) The additional judicial resources which would be necessary in order to achieve compliance with the time limits specified in subsections (b) and (c) of section 3161.

(4) The nature of the remedial measures which have been employed to improve conditions and practices in those districts with low compliance experience under this chapter or to promote the adoption of practices and procedures which have been successful in those districts with high compliance experience under this chapter.

(5) If a district has experienced difficulty in complying with this chapter, but an application for relief under section 3174 has not been made, the reason why such application has not been made.

(6) The impact of compliance with the time limits of subsections (b) and (c) of section 3161 upon the civil case calendar in each district as demonstrated by the information assembled and statistics compiled and submitted under sections 3166 and 3170.

(c) Not later than December 31, 1979, the Department of Justice shall prepare and submit to the Congress a report which sets forth the impact of the implementation of this chapter upon the office of the United States Attorney in each district and which shall also include—

(1) the reasons why, in those cases not in compliance, the provisions of section 3161(h) have not been adequate to accommodate reasonable periods of delay;

(2) the nature of the remedial measures which have been employed to improve conditions and practices in the offices of the United States Attorneys in those districts with low compliance experience under this chapter or to promote the adoption of practices and procedures which have been successful in those districts with high compliance experience under this chapter;

(3) the additional resources for the offices of the United States Attorneys which would be necessary to achieve compliance with the time limits of subsections (b) and (c) of section 3161;

(4) suggested changes in the guidelines or other rules implementing this chapter or statutory amendments which the Department of Justice deems necessary to further improve the administration of justice and meet the objectives of this chapter; and

(5) the impact of compliance with the time limits of subsections (b) and (c) of section 3161 upon the litigation of civil cases by the offices of the United States Attorneys and the rule changes, statutory amendments, and resources necessary to assure that such litigation is not prejudiced by full compliance with this chapter.

(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2083, and amended Pub.L. 96-43, § 9(e), Aug. 2, 1979, 93 Stat. 330.)

§ 3168. Planning process

(a) Within sixty days after July 1, 1975, each United States district court shall convene a planning group consisting at minimum of the Chief Judge, a United States magistrate judge, if any designated by the Chief Judge, the United States Attorney, the Clerk of the district court, the Federal Public Defender, if any, two private attorneys, one with substantial experience in the defense of criminal cases in the district and one with substantial experience in civil litigation in the district, the Chief United States Probation Officer for the district, and a person skilled in criminal justice research who shall act as reporter for the group. The group shall advise the district court with respect to the formulation of all district plans and shall submit its recommendations to the district court for each of the district plans required by section 3165. The group shall be responsible for the initial formulation of all district plans and of the reports required by this chapter and in aid thereof, it shall be entitled to the planning funds specified in section 3171.

(b) The planning group shall address itself to the need for reforms in the criminal justice system, including but not limited to changes in the grand jury system, the finality of criminal judgments, habeas corpus and collateral attacks, pretrial diversion, pretrial detention, excessive reach of Federal criminal law, simplification and improvement of pretrial and sentencing procedures, and appellate delay.

(c) Members of the planning group with the exception of the reporter shall receive no additional compensation for their services, but shall be reimbursed for travel, subsistence and other necessary expenses incurred by them in carrying out the duties of the advisory group in accordance with the provisions of title 5, United States Code, chapter 57. The reporter shall be compensated in accordance with section 3109 of title 5, United States Code, and notwithstanding

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other provisions of law he may be employed for any period of time during which his services are needed.
(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2083, and amended Pub.L. 96-43, § 9(d), Aug. 2, 1979, 93 Stat. 330; Pub.L. 101-650, Title III, § 321, Dec. 1, 1990, 104 Stat. 5117.)

HISTORICAL AND STATUTORY NOTES

Change of Name

"United States magistrate judge" substituted for "United States magistrate" in subsec. (a) pursuant to section 321 of Pub.L. 101-650, set out as a note under 28 U.S.C.A. § 631.

§ 3169. Federal Judicial Center

The Federal Judicial Center shall advise and consult with the planning groups and the district courts in connection with their duties under this chapter.
(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2084.)

§ 3170. Speedy trial data

(a) To facilitate the planning process, the implementation of the time limits, and continuous and permanent compliance with the objectives of this chapter, the clerk of each district court shall assemble the information and compile the statistics described in sections 3166(b) and 3166(c) of this title. The clerk of each district court shall assemble such information and compile such statistics on such forms and under such regulations as the Administrative Office of the United States Courts shall prescribe with the approval of the Judicial Conference and after consultation with the Attorney General.

(b) The clerk of each district court is authorized to obtain the information required by sections 3166(b) and 3166(c) from all relevant sources including the United States Attorney, Federal Public Defender, private defense counsel appearing in criminal cases in the district, United States district court judges, and the chief Federal Probation Officer for the district. This subsection shall not be construed to require the release of any confidential or privileged information.

(c) The information and statistics compiled by the clerk pursuant to this section shall be made available to the district court, the planning group, the circuit council, and the Administrative Office of the United States Courts.
(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2084, and amended Pub.L. 96-43, § 9(f), Aug. 2, 1979, 93 Stat. 331; Pub.L. 101-647, Title XXXV, § 3579, Nov. 29, 1990, 104 Stat. 4929.)

§ 3171. Planning appropriations

(a) There is authorized to be appropriated for the fiscal year ending June 30, 1975, to the Federal judiciary the sum of $2,500,000 to be allocated by the Administrative Office of the United States Courts to Federal judicial districts to carry out the initial phases of planning and implementation of speedy trial plans under this chapter. The funds so appropriated shall remain available until expended.

(b) No funds appropriated under this section may be expended in any district except by two-thirds vote of the planning group. Funds to the extent available may be expended for personnel, facilities, and any other purpose permitted by law.
(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2084.)

§ 3172. Definitions

As used in this chapter—

(1) the terms "judge" or "judicial officer" mean, unless otherwise indicated, any United States magistrate judge, Federal district judge, and

(2) the term "offense" means any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a Class B or C misdemeanor or an infraction, or an offense triable by court-martial, military commission, provost court, or other military tribunal).

(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2085, and amended Pub.L. 98-473, Title II, § 223(i), Oct. 12, 1984, 98 Stat. 2029; Pub.L. 101-650, Title III, § 321, Dec. 1, 1990, 104 Stat. 5117.)

HISTORICAL AND STATUTORY NOTES

Effective and Applicability Provisions

1984 Acts. Amendment by Pub.L. 98-473 effective Nov. 1, 1987, and applicable only to offenses committed after the taking effect of such amendment, see section 235(a)(1) of Pub.L. 98-473, set out as a note under section 3551 of this title.

Change of Name

"United States magistrate judge" substituted for "United States magistrate" in par. (1) pursuant to section 321 of Pub.L. 101-650, set out as a note under 28 U.S.C.A. § 631.

Savings Provisions

1984 Amendments. Amendment by Pub.L. 98-473 effective on the first day of first calendar month beginning thirty-six months after Oct. 12, 1984, applicable only to offenses committed after taking effect of sections 211 to 239 of Pub.L. 98-473, and except as otherwise provided for therein, see section 235 of Pub.L. 98-473, as amended, set out as a note under section 3551 of this title.

§ 3173. Sixth amendment rights

No provision of this chapter shall be interpreted as a bar to any claim of denial of speedy trial as required by amendment VI of the Constitution.
(Added by Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2085.)

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§ 3174. Judicial emergency and implementation

(a) In the event that any district court is unable to comply with the time limits set forth in section 3161(c) due to the status of its court calendars, the chief judge, where the existing resources are being efficiently utilized, may, after seeking the recommendations of the planning group, apply to the judicial council of the circuit for a suspension of such time limits as provided in subsection (b). The judicial council of the circuit shall evaluate the capabilities of the district, the availability of visiting judges from within and without the circuit, and make any recommendations it deems appropriate to alleviate calendar congestion resulting from the lack of resources.

(b) If the judicial council of the circuit finds that no remedy for such congestion is reasonably available, such council may, upon application by the chief judge of a district, grant a suspension of the time limits in section 3161(c) in such district for a period of time not to exceed one year for the trial of cases for which indictments or informations are filed during such one-year period. During such period of suspension, the time limits from arrest to indictment, set forth in section 3161(b), shall not be reduced, nor shall the sanctions set forth in section 3162 be suspended; but such time limits from indictment to trial shall not be increased to exceed one hundred and eighty days. The time limits for the trial of cases of detained persons who are being detained solely because they are awaiting trial shall not be affected by the provisions of this section.

(c)(1) If, prior to July 1, 1980, the chief judge of any district concludes, with the concurrence of the planning group convened in the district, that the district is prepared to implement the provisions of section 3162 in their entirety, he may apply to the judicial council of the circuit in which the district is located to implement such provisions. Such application shall show the degree of compliance in the district with the time limits set forth in subsections (b) and (c) of section 3161 during the twelve-calendar-month period preceding the date of such application and shall contain a proposed order and schedule for such implementation, which includes the date on which the provisions of section 3162 are to become effective in the district, the effect such implementation will have upon such district's practices and procedures, and provision for adequate notice to all interested parties.

(2) After review of any such application, the judicial council of the circuit shall enter an order implementing the provisions of section 3162 in their entirety in the district making application, or shall return such application to the chief judge of such district, together with an explanation setting forth such council's reasons for refusing to enter such order.

(d)(1) The approval of any application made pursuant to subsection (a) or (c) by a judicial council of a circuit shall be reported within ten days to the Director of the Administrative Office of the United States Courts, together with a copy of the application, a written report setting forth in sufficient detail the reasons for granting such application, and, in the case of an application made pursuant to subsection (a), a proposal for alleviating congestion in the district.

(2) The Director of the Administrative Office of the United States Courts shall not later than ten days after receipt transmit such report to the Congress and to the Judicial Conference of the United States. The judicial council of the circuit shall not grant a suspension to any district within six months following the expiration of a prior suspension without the consent of the Congress by Act of Congress. The limitation on granting a suspension made by this paragraph shall not apply with respect to any judicial district in which the prior suspension is in effect on the date of the enactment of the Speedy Trial Act Amendments Act of 1979.

(e) If the chief judge of the district court concludes that the need for suspension of time limits in such district under this section is of great urgency, he may order the limits suspended for a period not to exceed thirty days. Within ten days of entry of such order, the chief judge shall apply to the judicial council of the circuit for a suspension pursuant to subsection (a).

(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2085, and amended Pub.L. 96-43, § 10, Aug. 2, 1979, 93 Stat. 331.)

HISTORICAL AND STATUTORY NOTES

References in Text

The date of enactment of the Speedy Trial Act Amendments Act of 1979, referred to in subsec. (d)(2), means the date of enactment of Pub.L. 96-43, which was approved Aug. 2, 1979.

CHAPTER 209—EXTRADITION

Sec.
3181. Scope and limitation of chapter.
3182. Fugitives from State or Territory to State, District, or Territory.
3183. Fugitives from State, Territory, or Possession into extraterritorial jurisdiction of United States.
3184. Fugitives from foreign country to United States.
3185. Fugitives from country under control of United States into the United States.
3186. Secretary of State to surrender fugitive.

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§ 2111. Harmless error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

(Added May 24, 1949, c. 139, § 110, 63 Stat. 105.)

Rule 52. Harmless and Plain Error

(a) **Harmless Error.** Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

No. 04-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2004

JACOB ZEDNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

Counsel hereby certifies that three copies of the petition for a writ of certiorari and one copy of the application for leave to proceed in forma pauperis have been served by first-class mail on the Solicitor General of the United States.

Dated: New York, New York
August 22, 2005

By: _____

EDWARD S. ZAS
Counsel of Record

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August 22, 2005

Honorable William K. Suter
Clerk
Supreme Court of the United States
1 First Street, N.E.
Supreme Court Building
Washington, D.C. 20543

Re: JACOB ZEDNER v. UNITED STATES OF AMERICA
04-

Dear Mr. Suter:

Enclosed are ten copies each of a petition for a writ of certiorari with an attached appendix on behalf of Jacob Zedner, an application for leave to proceed in forma pauperis, and a certificate of service.

Three copies of the petition and appendix and one copy of the application for in forma pauperis relief have been served by first-class mail on the Solicitor General of the United States.

Very truly yours,

EDWARD S. ZAS
Associate Appellate Counsel

ESZ/gv
Enclosures

cc: Honorable Paul D. Clement
Acting Solicitor General of the United States
Room 5614
Department of Justice
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